# Petition

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IN THE

# Supreme Court of the United States

October Term, 1981

NO.

McCOY RESTAURANTS, INC.,
*Petitioner,*

v.

GREATER ORLANDO AVIATION AUTHORITY, DELTA AIR LINES, INC., EASTERN AIRLINES, INC., REPUBLIC AIRLINES, INC., NATIONAL AIRLINES, INC., and PAN AMERICAN AIRWAYS, INC., as Successor-In-Interest to NATIONAL AIRLINES, INC.,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (NOW THE ELEVENTH CIRCUIT)

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WILLIAM VanDERCREEK
800 Two Turtle Creek Village
Dallas, Texas 75219
(214) 559-2900
*Counsel of Record*

and

JEFFREY H. ABRAMS
of the Law Firm of
ROBERTS, MILLER, BAGGETT, LaFACE, RICHARD & WISER
P. O. Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

*Counsel for Petitioner*

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an antitrust complaint which alleges a combination or conspiracy between several airlines and an airport authority to control the procedure for awarding concessions at the airport for the express purpose of preventing the authority from negotiating or dealing with the plaintiff concessionaire, including the granting of an extension to the plaintiff, and which further alleges that the airlines are in vertical and horizontal competition with the plaintiff in a specific market, states a cause of action sufficient to withstand a Rule 12 motion to dismiss.

2. Whether an antitrust complaint which alleges that several airlines coerced an airport authority to share its limited monopoly power to grant concessions, and which further alleges that the airlines entered into a written agreement with the airport authority to prevent the authority from modifying its concession policies to negotiate and deal with the plaintiff concessionaire, may be dismissed on a Rule 12 motion on grounds of *Noerr-Pennington* or "State Action".

3. Whether it is appropriate for a federal appellate court to dispose of an appeal without opinion under local circuit rules where the trial court judgment is at least arguably in conflict on a question of law with decisions of the Supreme Court or a Federal Court of Appeals.

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Petitioner, McCoy Restaurants, Inc. ("McCoy"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 22, 1981, and clarified in the order denying McCoy's petition for rehearing on July 14, 1981.

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*Pursuant to Supreme Court Rule 28.1, McCoy states that it is not a publicly traded corporation; there are no parent companies, subsidiaries, or affiliates.

## Opinion Below

The affirmance without opinion by the Fifth Circuit Court of Appeals and the order denying rehearing, not reported, appear in the Appendix hereto. The ruling of the district court on the original complaint, the ruling on the amended complaint, and the final judgment of the district court are contained in the Appendix hereto.

## Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 22, 1981. A timely petition for rehearing was denied on July 14, 1981. On October 2, 1981, Justice Powell signed an order extending the time for filing this Petition for Certiorari to and including November 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## STATEMENT OF THE CASE

Petitioner, McCoy Restaurants, Inc. ("McCoy") seeks certiorari review of an affirmance of the dismissal of its amended complaint for failure to state a claim under Rule 12, Federal Rules of Civil Procedure. McCoy sued Defendant, Greater Orlando Aviation Authority ("Authority") and Defendants Delta, Eastern, Republic, National, and Pan American, as successor-in-interest to National ("Airlines"), seeking money damages and injunctive relief for violation of the federal antitrust laws.

Initially, the Authority's answer admitted many of the complaint's allegations and, in addition, asserted an affirmative defense that any damages to McCoy were caused by the

wrongful action of Delta "presumably with the other three airlines." The Authority also filed a cross-claim against the Airlines, alleging violations of the federal antitrust laws. However, prior to the hearing on the Airlines' Motion to Dismiss, the Authority filed an amended answer which denied many of the allegations of the complaint which it had previously admitted. The amended answer contained new affirmative defenses that substantially reiterated the Airlines' Motion to Dismiss and acknowledged that the Authority, subsequent to the filing of its initial answer and cross-claim, had entered into a settlement agreement with the Airlines. Pursuant to this settlement, the Authority had voluntarily dismissed "with prejudice" its antitrust cross-claim against the Airlines.

The trial court granted the Airlines' Motion to Dismiss on the basis of failure to state a claim but allowed McCoy ten days to file an amended complaint (App.-38; *infra;* hereinafter "A-"). The amended complaint is reproduced in the appendix hereto (A-24).

The Authority and the Airlines filed Motions to Dismiss the amended complaint urging lack of subject matter jurisdiction and failure to state a claim. The Airlines argued: (1) the preclusive effects of prior litigation; (2) the conduct of the Airlines and the Authority was not prohibited; (3) no causal connection between the antitrust violations and plaintiff's injury was alleged; and (4) no injury to competition was alleged.

The allegations and reasonable inferences of the amended complaint establish (for purposes of a Rule 12 Motion to Dismiss) certain facts which may be briefly summarized. McCoy has for several years been the purveyor of food and beverage at the Orlando International Airport pursuant to a valid concession contract awarded by the Authority that is scheduled to expire in 1987. Major new airport facilities were being constructed for completion in 1981. Because McCoy

would be required to invest several million dollars in capital improvements to equip and operate its concession in the new Orlando Airport terminal, the Authority had agreed to grant McCoy an extension of its concession agreement. (Complaint, Para. 4, 9, 21; hereinafter Para."; Appendix, *infra.)*

The Airlines objected to the proposed extension, claiming their Airline Lease and Use Agreements with the Authority limited the power of the Authority to modify its concession policy and negotiate extensions with concessionaires like McCoy without approval of the Airlines. Accordingly, Delta instituted a federal declaratory judgment proceeding against the Authority in which McCoy intervened as a defendant. Eastern, Republic and National were not joined as parties. That suit was the basis of the Airlines' res judicata/collateral estoppel argument asserted in the trial court on its Motion to Dismiss. In the declaratory judgment case, the same district judge had ruled that the Authority, under its Airline Lease Agreement, could not unilaterally extend McCoy's food and beverage concession without using competitive proposals. In a supplemental declaratory ruling sought by Delta, the court ruled that the Authority, under its agreement with the Airlines, could not accept competitive proposals until shortly before the expiration of McCoy's lease in 1987 (Para. 14, 15, 21). Subsequently, McCoy's appeal of the declaratory judgment was dismissed by the Fifth Circuit on grounds of mootness, the judgment was ordered vacated and the complaint dismissed. (*See,* Order Denying Rehearing, A-52)

In addition to allegations of antitrust violations in horizontal and vertical relationships, the Airlines' conduct with the Authority substantially affects competition between the Airlines and the various concessionaires, including McCoy, in reference to generating revenues for satisfying the bond debt-service. Under the Airlines' Lease Agreement, the revenues of the various concessions are first applied against the debt-service for airport revenue bonds; the remainder of the

obligation, if any, is assumed by the Airlines as landing fees. The Airlines, through their conspiracy with the Authority, are seeking to cause the concessionaires, including McCoy, to pay such substantial sums that the Airlines will not have to pay any landing fees and will have free use of the airport over a major portion of the 25-year term of the Lease Agreement. To the public injury, the Airlines seek to maximize costs and fees charged to the general public at the airport by the concessionaires, including McCoy, in order to reduce, if not eliminate, the fees to be paid by the Airlines. (Para. 17, 18, 19)

The complaint alleges that the Authority fully intended to award McCoy a lease extension but, because of the combination, was coerced into refusing to deal with McCoy. After the Authority filed its original answer, the Authority entered into a collective agreement with the Airlines which provided that the Authority would not modify its concession policy for at least twenty-five years without prior approval of the Airlines. The complaint alleges that the activities of the Airlines in combination with the Authority were not authorized or directed by state law. It further alleges that the delegation of power by the Authority was in contravention of the state law which granted concession powers solely to the Authority. (Para. 5, 6, 8, 12, 14, 16, 18, 20, 21.)

Following briefs and arguments of counsel, but without allowing discovery, the trial judge granted the Motion to Dismiss the amended complaint for failure to state a claim. The trial court's rulings, delivered orally from the bench, appeared to be based upon (1) res judicata and collateral estoppel, (2) *Noerr-Pennington,* and (3) failure to sufficiently show competitive injury (A-43). The amended complaint was ordered dismissed with prejudice and a final judgment was entered (A-50). A timely appeal was perfected. At oral argument in the Fifth Circuit, the panel was advised that another panel had, on Delta's motion, dismissed for mootness McCoy's appeal of the earlier declaratory judgment

proceeding that the trial court had relied upon in its rulings and that the Fifth Circuit had issued a mandate ordering the declaratory judgment vacated and Delta's complaint dismissed. Nevertheless, the court affirmed the judgment below without opinion under Fifth Circuit Rule 21. In denying the petition for rehearing, the court stated:

> On April 22, 1981, we affirmed the district court's decision without writing an opinion. The district court had based its decision on three grounds, res judicata and related concepts, state action exemption, and failure to state a claim under the federal antitrust laws . . .
>
> To remove any possibility of misunderstanding about the effect of our decision rendered without opinion in this case, we point out that the affirmance was not based on the ground of res judicata, but on the other two grounds contained in the district court's order. (A-53)

Petitioner McCoy obtained an extension of time to file the Petition for Certiorari to November 11, 1981. The Petition for Certiorari is timely filed.

## REASONS FOR GRANTING THE WRIT

### PRELIMINARY STATEMENT

The questions presented stating conflicts with decisions of this Court and other courts of appeals, and the utilization of appellate dispositions without opinion, are set in a context involving the impact of the federal antitrust laws upon the economic relationships among airport authorities, airlines, and airport concessionaires. This is a matter of considerable public interest because the basic structure of the air

transportation industry in the United States in financing the construction and improvement of airports depends upon revenue bonds paid by income and fees generated from airport concessions and airlines.

## I. THE FIFTH CIRCUIT'S DECISION SUMMARILY AFFIRMING THE DISMISSAL OF McCOY'S AMENDED COMPLAINT ON A RULE 12 (b) (6) MOTION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT CONCERNING THE ALLEGATIONS NECESSARY TO STATE A CLAIM UNDER THE FEDERAL ANTITRUST LAWS.

The Fifth Circuit's summary affirmance of the judgment below squarely conflicts with this Court's ruling in *Radovich v. National Football League,* 352 U.S. 445 (1957). The Rule 12 dismissal was apparently based on the Airlines' contention that the complaint failed to allege an injury to competition and a causal connection between the antitrust violation and McCoy's injury. The trial court did acknowledge, however, that the amended complaint alleged that McCoy would have obtained an extension of its current lease except for the antitrust violations of the airlines ( A-47). Considering that the Authority's original answer admitted that it would have granted a lease extension to McCoy except for the wrongful conduct of the Airlines and, in addition, asserted an antitrust cross-claim against the Airlines, the use of a Rule 12(b) motion seems dubious, particularly when these facts were pled in the amended complaint.

The same test of *Conley v. Gibson,* 355 U.S. 41 (1957), that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, is applicable to antitrust actions. In *Radovich v. National Football League, supra,* this Court held that the test

as to sufficiency for antitrust complaints is whether "the claim is wholly frivolous." 352 U.S. at 453, *quoting, Hart v. B.F. Keith Vaudeville Exchange,* 262 U.S. 271, 274 (1923). The Fifth Circuit's disposition is in conflict with *Radovich* because the affirmance, as acknowledged in the denial of rehearing, was based upon substantive determinations of *Noerr-Pennington* and lack of a competitive injury.

In order to state an antitrust claim all this Court has required are allegations which show that an antitrust violation has occurred and that the plaintiff was injured thereby. *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.,* 364 U.S. 656 (1961). This may involve a threatened loss or damage to business or property, *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972), and causation may be established by alleging a direct causative link between the violation and the injury. *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690 (1962).

Although McCoy presently has the right to provide all food and beverage services at the airport, the complaint alleges that the Airlines, as horizontal competitors, plan to provide food and beverage services to customers in facilities to be controlled or operated by the Airlines. McCoy also has the on-field concession for in-flight catering to the Airlines [who now use an off-field caterer]. The complaint charges that the Airlines have already sustained economic relationships with competitors of McCoy and have sought to replace McCoy with a caterer who will sell according to their terms (Para. 17, 28).

The Airlines' financial interest and the reason for their collective opposition to McCoy is because they want a concessionaire who would be required to pay substantially higher fees to the Authority than McCoy would if its extension had been granted. Although higher fees paid by a concessionaire would produce higher prices and less services

to the public, it would also result in the Airlines not having to pay any landing fees for bond debt-service under the Airlines Lease and Use Agreement. (Para. 18, 19)

In sum, the complaint alleges a competitive relationship between the Airlines and McCoy which gives the Airlines financial motivation to deny McCoy an extension of its concession lease and to control the concession granting process. It alleges that the Airlines coercively entered into an agreement with the Authority to control the terms and conditions in which the Authority may do business with McCoy (Para. 15, 16, 21) and further asserts that the Airlines and Authority affected a group boycott or refusal to deal. This states a claim under the antitrust laws. *See Klor's v. Broadway-Hale Stores, Inc.* 359 U.S. 207 (1959). As this Court stated in *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 614 (1953), the claim need only be "tested against the Sherman Act's general prohibition on unreasonable restraints of trade."

The Fifth Circuit's decision directly conflicts with *Radovich v. National Football League, supra,* and *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., supra.* The complaint should not have been dismissed. McCoy suffered injury as a direct result of the unlawful combination and conspiracy. The complaint alleges that the Authority fully intended to award McCoy a lease extension which would have enhanced the value of its present lease, protected future profits, and enabled McCoy to amortize its capital investment. (Para. 20). McCoy has not had the opportunity to conduct any discovery and prove its charges. In view of the real conflict which has been created by the Fifth Circuit on this crucial question of law, a writ of certiorari should issue.

## II. THE FIFTH CIRCUIT'S DECISION SUMMARILY AFFIRMING THE DISMISSAL OF McCOY'S AMENDED COMPLAINT ON A

## RULE 12 (b) MOTION BASED UPON THE STATE ACTION EXEMPTION TO THE ANTITRUST LAWS IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AS WELL AS DECISIONS OF OTHER COURTS OF APPEALS.

The affirmance by the Fifth Circuit conflicts directly with decisions of this Court as well as decisions of other courts of appeals concerning the disposition, and application, of "state action" or *Noerr-Pennington* on Rule 12 motions to dismiss. The district court held that the amended complaint should be dismissed for failure to state a claim on the basis of *Noerr-Pennington.*[1] The Fifth Circuit acknowledged, in denying rehearing, that its affirmance without opinion was based upon two grounds including the state action exemption (A-53). Such disposition conflicts with decisions of the Third and Seventh Circuits; *Duke and Company, Inc. v. Foerster,* 521 F.2d 1277 (3rd Cir. 1975), *Kurek v. Pleasure Driveway and Park District,* 557 F.2d 580 (7th Cir. 1977), *vacated and remanded,* 435 U.S. 992, *reinstated,* 583 F.2d 378 (7th Cir. 1978), *cert.*

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[1]Now, just a word about Noerr-Pennington and California Retail Liquor Dealers Association. I think that in the facts of this case the rulings of Noerr—the principles of *Noerr-Pennington* apply and not California Retail Liquor Dealers Association. The rulings to which the Plaintiff objects are the rulings of the Court and not of the Airlines.

By a type of legerdemain the brief of the Plaintiff states that the Airlines are not under State control, their actions are not State regulated so that California Retail Liquor Dealers Association applies. Well, the Airlines are not ones making the decision as in California Retail Liquor Dealers Association. It's the Court that's making the decision, and that comes under Noerr-Pennington. (A-49)

*denied*, 439 U.S. 1090 (1979); as well as decisions of this Court; *Cantor v. Detroit Edison Co.*, 427 U.S. 579 (1976) and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), concerning the application and disposition of antitrust immunity issues on Rule 12 motions to dismiss.

The Fifth Circuit's decision directly conflicted with *Kurek v. Pleasure Driveway and Park District, supra.* There, the Seventh Circuit reversed the Rule 12 dismissal of an antitrust complaint predicated on *Noerr-Pennington* and *Parker* state action. The complaint alleged that members of a park district and other private defendants combined to coerce park concessionaires into raising their prices to generate more revenue for the district. The court concluded that antitrust immunity for a subordinate government unit, as opposed to the State itself, "cannot be automatic." 557 F.2d at 590. As the Seventh Circuit noted in discussing *Noerr-Pennington* and state action, courts should not "accept superficial and mechanical application of a *Parker*-based 'rule' that antitrust inquiry ends upon such finding of government actions or laws being involved." 557 F.2d at 589. To the contrary, the Fifth Circuit in the instant case necessarily found the state action exemption "automatically" applicable in affirming the Rule 12 dismissal.

The Seventh Circuit in *Kurek* noted that *Parker* "state action" was not, strictly speaking, an affirmative defense but rather it was an activity to which the Sherman Act was not intended to apply. 557 F.2d at 587, n. 5. Accordingly, the Seventh Circuit applied the *Conley v. Gibson, supra* standard for failure to state a claim. McCoy would suggest that while the *Parker* doctrine may not be an affirmative defense in the technical sense, the test for affirmative defenses on Rule 12 motions is the standard to be applied to *Noerr-Pennington* and *Parker* issues. Generally, to dismiss a complaint on a Rule 12 motion the existence of the affirmative defense must be conclusively established on the face of the complaint. *E.g.*

*Miller v. Shell Oil Co.*, 345 F.2d 891 (10th Cir. 1965); *2 Moore's Federal Practice* § 1875 (2d. ed. 1960). In the case at bar, however, the district court below seems to have erroneously placed the burden on the plaintiff to conclusively show the non-existence of *Noerr-Pennington*. This Court has ruled that there is a strong presumption against exclusion from the antitrust laws. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1979). While McCoy maintains that the amended complaint does, in fact, expressly negate the application of *Noerr-Pennington* or "state action," the test that should be applied for purposes of Rule 12 is whether the antitrust exemption is conclusively established on the face of the pleading. The test is not satisfied in this case.

The Airlines argued in their Motion to Dismiss that their actions were protected by *Noerr-Pennington*.

> McCoy's Amended Complaint . . . alleges nothing more than joint efforts by the airlines to influence decision-making process of the authority, resort to the judicial process once efforts at persuasion prove futile, and enforcement of this court's lawful decrees. (Airlines' Memorandum in Support of Motion to Dismiss - p. 9).

McCoy recognizes that if the basis of its complaint was the litigation initiated by Delta against the Authority, the issue of *Noerr-Pennington* would center on whether the litigation was baseless or a sham. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The declaratory judgment proceeding may have been the erroneous basis of the trial court's ruling, but it was not the basis of McCoy's complaint. Paragraph 21 of the complaint alleges that McCoy was not injured until after the court issued its declaratory judgment (since vacated) and the Airlines thereafter had coerced the Authority to reject the agreed lease extension.

Under these circumstances, the application of *Noerr-Pennington* also directly conflicts with *Duke and Company, Inc. v. Foerster, supra.* There, the Third Circuit reversed the Rule 12 dismissal of an antitrust complaint on the basis of *Noerr-Pennington* and *Parker* state action. In *Duke,* the defendants were various private concessionaires in the Pittsburgh municipal stadium. The plaintiff alleged a conspiracy between the municipal authority and the private concessionaires to exclude the plaintiff's product (beer) from the stadium. The court held that *Noerr-Pennington* did not apply where the complaint goes beyond mere allegations of official persuasion by anti-competitive lobbying and claims official participation with private individuals in a scheme to restrain trade. 521 F.2d at 1282.

The facts in *Duke* and this case are strikingly similar. McCoy's amended complaint alleges that the Airlines plan to provide food and beverage to customers in facilities to be operated or controlled by the individual Airlines; thus, the Airlines are in horizontal competition with McCoy. The complaint further alleges that the Airlines are seeking to replace McCoy with a "favorable concessionaire" who will offer preferential discounts for in-flight catering service to the Airlines. Like the plaintiff in *Duke,* McCoy alleged a conspiracy between the Authority and the Airlines to exclude McCoy from the negotiating process. McCoy's complaint goes beyond mere allegations of initiating litigation or official lobbying; it claims official participation in a conspiracy to exclude McCoy from negotiating for a lease extension (Para. 17, 19, 21).

The respondents have argued that any combination between the Airlines and the Authority to exclude McCoy from the Airport concession market would be protected by *Noerr-Pennington* because it involves appealing to a government agency. An extension of that argument would exempt from antitrust scrutiny any private

combination which successfully enlists an agency of state or local government in an antitrust violation. Such a result was clearly rejected by this Court in *Cantor v. Detroit Edison Co., supra.* In that case, a private utility company claimed antitrust immunity for a practice which tied the distribution of light bulbs to the sale of electricity on the ground that the system had been approved by the Michigan Public Service Commission. This Court concluded that the utility company's actions were not exempt from antitrust scrutiny simply because the utility played a significant role in advocating the tariff policy before the PSC. 427 U.S. at 592-95. The Court decided that the defendant's advocacy of the distribution system could not be protected by *Noerr-Pennington* where "the significance of state action . . . amounts to little more than approval of a private proposal." 427 U.S. 602.

Paragraph 21 of the amended complaint alleges that the Authority was coerced into accepting the demands of the Airlines for the purpose of excluding McCoy from the concession market. It states that the Airlines have distinct financial interests in granting concessions which are independent of, and even opposed to, the public interest. The interference by the Airlines with the Authority's statutory responsibility to grant concessions does not constitute an appeal to a government institution for the promulgation or application of certain rules. Therefore, applying the test of Rule 12 (b) motions, the allegations of the complaint do not, on their face, conclusively show that the defendant's actions were protected by *Noerr-Pennington.*

The state action exemption is distinguishable from, although often used interchangably with, *Noerr-Pennington.* But regardless of labels, the result below conflicts directly and in principle with the clearly articulated standards and decisions of the Court in *Cantor v. Detroit Edison Co., supra,* and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc,. supra.* In *Cantor,* the petitioner, claimed that

Detroit Edison was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. This Court decided that the state action exemption from the federal antitrust laws should not be inferred merely because the PSC sanctioned an anticompetitive arrangement proposed by the defendant utility. Although certain monopolies may be preserved by the State in the public interest (*e.g.*,electricity) other competitive markets must remain amenable to antitrust standards.

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra.*, a wholesale distributor of wine challenged the wine pricing system adopted by the California Bureau of Alcohol Control. The statute required all wine producers and wholesalers to file trade contracts or price schedules with the State, indicating the price at which they were obligated to sell to the retailer. This Court decided that California's retail wine-pricing system constituted retail price maintenance in violation of the Sherman Act because the wine producer had the power to prevent price competition by dictating the price charged by wholesalers. The Court rejected all contentions that state involvement in the scheme would establish antitrust immunity. The system satisfied the first requirement for *Parker* immunity: *i.e.*, the challenged restraint must be "one closely articulated and affirmatively expressed as state policy." 445 U.S. at 105. However, the clear legislative policy did not meet the second requirement for *Parker* immunity; the State must actually regulate, monitor, and supervise the activity that is subject to antitrust challenge. *Id.*

In the case at bar, the Airlines are attempting to jointly exercise the monopoly power granted solely to the Authority

by Section 13, Chapter 75-464, Laws of Florida, 1975. The combination is effected by several agreements which restrain the Authority's power to unilaterally modify its consumer service plan without the approval of the Airlines. This shared power was exercised by the Airlines to veto McCoy's proposed lease extension and thereby restrain competition for the food and beverage concession. While the Authority originally enjoyed a lawful monopoly over the concession market, the sharing of that monopoly power with the Airlines injured McCoy in its property or business. As this Court stated in the *City of Lafayette v. Louisiana Power and Light Co., supra,* "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization."

The instant case is analogous to *Cantor* and *California Retail Liquors.* Both situations involve a monopoly power that could be rightfully exercised by the State. In *Cantor,* the utility monopoly was extended beyond its reasonable limits to include the light bulb market. In *California Retail Liquors,* the lawful power of the State was exercised by private parties. McCoy's amended complaint alleges a coercive combination between private defendants and a government entity to exclude McCoy from the market. The law is clear that governmental action that is dictated by or substantially shared with private parties is not exempt from the antitrust laws. Therefore, the decision of the lower court squarely rejected the law as dictated by this Court and other courts of appeals.

On or about October 13, 1981, this Court heard argument in a case from the Tenth Circuit concerning the state action status of home rule cities. *Community Communications Company, Inc. v. City of Boulder,* No. 80-1350. Whether or not the result below will conflict with the decision that this Court will announce at a future date is, of course, not known. The posture of the instant case is unique

because McCoy's complaint was dismissed on a Rule 12(b) motion based upon the state action exemption, a concept that this Court is carefully developing through the decision-making process. A writ of certiorari should issue to resolve the conflicts, to determine how lower courts should treat assertions of antitrust exemptions on Rule 12 motions, and to provide guidance as to the proper application and disposition of state action and *Noerr-Pennington* issues.

## III. THIS COURT UNDER ITS SUPERVISORY POWERS SHOULD REVIEW THE APPROPRIATENESS OF FEDERAL APPELLATE DISPOSITIONS WITHOUT OPINION WHERE QUESTIONS OF LAW HAVE BEEN DECIDED BY A TRIAL COURT IN A MANNER THAT ARGUABLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS.

The enormous increase in federal appeals is one of the foremost problems confronting the federal judiciary. One result is that several circuits have provided by local rule for the disposition of appeals without opinion such as Fifth Circuit Rule 21.[2] During the last four years, the Fifth Circuit entered Rule 21 dispositions in 16.3% of all cases.[3] Petitioner does not doubt the necessity for appellate courts to have considerable

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[2]*See e.g.* D.C. Cir. R. 13 (c.); 1st Cir. R. 17; 2d Cir. R. 0.23; 4th Cir. R. 18 (c); 7th Cir. R. 28; 8th Cir. R. 14; 9th Cir. R. 21; 10th Cir. R. 17; 11th Cir. Interim R. 25.

[3]Clerk's Report for July 1979-June 1980, *Judicial Business of the United States Court of Appeals for the Fifth Circuit*, 1980. For the period of July, 1980 through June, 1981, the Fifth Circuit entered 340 Rule 21 dispositions. Interim Report.

flexibility in the manner in which they process appeals, including means to best utilize and conserve judicial time. This Court is well cognizant of the problem and the Fifth Circuit practice under its Rule 21. Justice Rehnquist's dissent in *Taylor v. McKeithen*, 407 U.S. 191 (1972), observed:

> The courts of appeals are statutory courts, having the power to prescribe rules for the conduct of their own business so long as those rules are consistent with applicable law and rules of practice and procedure prescribed by this Court, 28 U.S.C. § 2071. No existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, or from deciding cases without any opinion at all. Cf. Rule 21, Court of Appeals for the Fifth Circuit. The courts of appeals, and particularly the Fifth Circuit, which has experienced the heaviest caseload of all the circuits, need the maximum possible latitude to deal with the "flood tide" of appeals which the "ever growing explosive increase" of federal judicial business has produced.
>
> I think decisions as to whether opinions should accompany judgments of the courts of appeals, and the desirable length and content of those opinions are matters best left to the judges of the courts of appeals. I therefore dissent from the order of vacation and remand. (citations omitted)

407 U.S at 193.

Petitioner would suggest there is a need for a majority resolution by this Court on the latitudes of non-opinion dispositions, especially directed to appeals involving questions of law that have been decided by a trial court in a manner that arguably conflicts with decisions of the Supreme Court or decisions of another circuit. Petitioner suggests that such

appeals should be disposed of without opinion in only the rarest cases. This view is reflected in the 1975 Senate Report to the Omnibus Circuit Judgeship Bill:

> There is another matter of some concern to the Committee. While opinions may vary as to whether "one appeal" is a matter of constitutional right, as a matter of long established practice and custom, appellate review of a trial court decision is regarded as a "right" by both lawyers and nonlawyers. This is not to say that this "right" of judicial review necessarily carries with it a right to have the matter follow the full and traditional procedure of complete briefs, oral argument, and a signed majority opinion. Established legal precedents have long recognized the propriety of summary disposition of appeals. However, an undue expansion of summary proceedings poses a danger that the "right of appeal" may be converted to the same status as a petition for writ of certiorari which is addressed to the discretion of the Appellate Court. Discretionary review by writ of Certiori was not granted to Courts of Appeal by the Judges Act of 1925.

S. Rep. No. 94-404, 94th Cong., lst Sess. 396 (1975).

The virtue and vice of appellate disposition without opinion has also been noted by legal scholars, specifically in reference to Fifth Circuit Rule 21:

> The value of Rule 21 in expediting the disposition of cases should be obvious. A one line disposition of the entire case, as is contemplated by Fifth Circuit Rule 21, is even quicker than the traditional per curiam opinion.
>
> * * *
>
> Its use, in appropriate cases, also alleviates to some degree the growing problem of reporter systems

> filled with lengthy opinions important only to the individual litigants. But the use of affirmances without opinions is certainly not to be encouraged in other than clearly deserving cases.
>
> * * *
>
> The rule is also subject to abuse. An unexplained affirmance, reached through valid processes and indeed within one of the four criteria of Rule 21, is probably inconsequential. But any decision made under Rule 21 because the court was unwilling to expose itself to criticism for an erroneous or unjust result clearly constitutes an abuse of the court's power, subordinates justice to speed, and subverts needed improvements to illegitimate ends. In times of growing distrust of governmental authority, the courts perhaps ask too much when, by a one line disposition, they ask lawyers, litigants and scholars to accept their uncriticizable result. More importantly, in their use of this tool a circuit court, performing its function in the federal system, should guard against the criticism that has been leveled at the Appellate Division of the Supreme Court of New York. Professor Hazard alleges that the courts of the Appellate Division "ceased long ago to write extended thoughtful opinions, except on rare occassions, and have become what they are in name, virtually a branch of the trial court rather than an intermediate tribunal for plenary review." (footnotes omitted)

Haworth, *Screening and Summary Procedures in the United States Courts of Appeals,* 1973 Wash. U.L.Q. 257, 272-73 (1973).

In the case at bar, Petitioner has no doubt that the court below fairly considered its appeal and that the able judges who decided the case honestly believed that the dismissal for failure

to state a claim should be affirmed. But justified faith in the integrity of the appellate panel does not mean that the disposition of appeals should be analogous to the form of a general verdict rendered by a jury.

The enormous federal appellate caseload that fosters the problems of the efficient and just administration of justice by the courts of appeals also serves to preclude this Court from reviewing more than a small fraction of cases and thus converting the various circuits into essentially courts of last resort. The practical impossibility of this Court to enforce the lower federal courts' adherence to Supreme Court precedent by frequent certiorari review of non-opinion dispositions again suggests the need for circuits to express their reasoning process in cases like the one at bar.

This Court has recognized that public policy favors the private enforcement of federal antitrust laws. *See, Reiter v. Sonotone Corp.*, 442 U.S. 330, 334. (1979). The summary disposition by the district court on a Rule 12 motion without allowing discovery and the Fifth Circuit's affirmance without opinion notwithstanding the presence of legal issues concerning complex, vital and recurring aspects of antitrust law (*Noerr-Pennington* and injury to competition) suggest that, in reality, private antitrust suits are disfavored actions.

Although the Fifth Circuit explicitly informs counsel that a Rule 21 disposition is not a basis for rehearing, in the petition for rehearing and clarification counsel attached copies of the mandate directing the declaratory judgment (the case that was relied upon for res judicata) be vacated and dismissed, and also suggested that the proceeding was not a Rule 21 situation. Indeed, the Fifth Circuit in denying the petition for rehearing acknowledged that its basis of affirmance was not res judicata but rather state action *(Noerr-Pennington)* and injury to competition. These are complex legal issues which certainly warrant an opinion. To allow a Rule 21 disposition under such

circumstances would be encouraging the possible use of dispositions without opinion to avoid the acknowledgement of opposing precedent which Professor Llewellyn severely criticizes on page 85 of his classic work, *The Common Law Tradition: Deciding Appeals* (1960).

This Court has recognized the importance of state action and *Noerr-Pennington* problems in at least six decisions in the past three years, including one that was argued this October. Petitioner would suggest that if the problems are significant enough for this Court to resolve, a trial court order that is at least arguably in conflict warrants an opinion by a court of appeals.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM VanDERCREEK
800 Two Turtle Creek Village
Dallas, Texas 75219
(214) 559-2900

*Counsel of Record*

and

JEFFREY H . ABRAMS
of the Law Firm of
ROBERTS, MILLER, BAGGETT,
LaFACE, RICHARD & WISER
P. O. Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

*Counsel for Petitioner*

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

McCOY RESTAURANTS, INC.,

*Plaintiff,*

vs.

GREATER ORLANDO AVIATION AUTHORITY,
DELTA AIR LINES, INC.,
EASTERN AIRLINES, INC.,
REPUBLIC AIRLINES, INC.,
NATIONAL AIRLINES, INC., and
PAN AMERICAN AIRWAYS, INC.
as Successor-In-Interest to
NATIONAL AIRLINES, INC.

*Defendants*

CASE NO. 80-87-ORL-CIV-Y

## AMENDED COMPLAINT

Pursuant to the Order of this Court granting leave to amend, the Complaint is amended to read as follows:

1. This action arises under 15 U.S.C. Sections 1, 2, 3, 15 and 16, commonly known as the Sherman Antitrust Act, as amended by the Clayton Act, as herinafter more fully appears.

2. Plaintiff McCoy Restaurants, Inc. (McCOY), is a corporation, incorporated under the laws of Florida, which operates a food and beverage concession at Orlando International Airport in Orlando, Florida. Defendant Greater

Orlando Aviation Authority (AUTHORITY) is an agency of the City of Orlando created by special acts of the Florida Legislature, particularly Ch. 57-1658, Laws of Florida 1957, as amended by Ch. 75-464, Laws of Florida 1975, for the purposes of constructing, establishing, improving and operating (among others) certain aviation facilities including Orlando International Airport. Defendant Delta Air Lines, Inc. (DELTA), is a corporation, incorporated under the laws of Delaware, which engages in interstate aviation commerce to and from said Airport. Defendant Eastern Airlines, Inc. (EASTERN), is a corporation, incorporated under the laws of Delaware, which engages in interstate aviation commerce to and from said Airport. Defendant Republic Airlines, Inc. (REPUBLIC), is a corporation, incorporated under the laws of Wisconsin, which engages in interstate aviation commerce to and from said Airport. Defendant National Airlines, Inc. (NATIONAL), is a corporation, incorporated under the laws of Florida, which engages in interstate aviation commerce to and from said Airport. Defendant Pan American Airways, Inc. is the successor-in-interest to National Airlines, Inc. Pan American Airlines, Inc. and National Airlines, Inc. shall be collectively referred to as NATIONAL. The defendant Airlines shall be collectively referred to as AIRLINES.

3. Orlando International Airport serves commercial passengers and cargo carried by DELTA, EASTERN, NATIONAL and REPUBLIC to and from states other than Florida and serves commercial traffic, carried by EASTERN and NATIONAL, to and from the District of Columbia. In the course of a year, thousands of such flights are conducted to and from AUTHORITY'S said Airport. Thousands of passengers and aircrew members engaged in interstate commerce use the airport and its consumer service concessions, including the food and beverage concessions operated by McCOY.

4. AUTHORITY is constructing new terminal facilities at said airport to be substantially completed and placed in service on or about July 1, 1981. The new terminal will also include consumer service concessions designed primarily to serve persons engaged in commercial interstate travel and transportation.

5. Section 7, Ch. 75-474, Laws of Florida 1975, obligates the AUTHORITY to plan for and build necessary new facilities now close to completion. The comprehensive plan was to use, among other things, revenue policies to develop plans for construction and development of facilities for handling air passengers. That law conferred legislative discretion in the AUTHORITY to extend, modify or change its comprehensive plan from time to time. No provision was made in that law for the AUTHORITY to contract with DELTA, EASTERN, NATIONAL or REPUBLIC to abandon its discretionary legislative power, whether for their benefit or as consideration to them.

6. Section 18, Ch. 75-464, Laws of Florida 1975, establishes the procedure to be followed by the AUTHORITY in ascertaining its anticipated revenues and budgeting expenditures for each fiscal year. The AUTHORITY may only budget the spending of more money legally available to it for specific purposes in addition to money it expects to receive as revenues. The AUTHORITY must base that expectation upon reasonable projections of past experience with established sources as well as upon new projects or new sources of income. After adoption as a proposal, the budget is voted on by the Orlando City Council and then if approved, adopted as the firm budget by the AUTHORITY. The law makes no provision for DELTA, EASTERN, NATIONAL or REPUBLIC to direct, control, restrain or otherwise interfere with this legislative process.

7. The new terminal will be funded with inflationary generation bonds which provide for fixed payment. The defendant AIRLINES are obligated to share the debt-service obligation of the revenue bonds for the new airport. As long as the airline uses the facilities of the new terminal, it is obligated to guarantee the full payment and amortization of the revenue bonds. In the Airlines-Airport Lease and Use Agreement, the *revenues of the various concessions* are to be applied against the debt-service obligation. The Airline landing fees are calculated annually and determined as a function of the readjustment clause which provides:

> After adjustments to fees and charges have been made for a particular Fiscal Year with consideration to the above factors, landing fees payable by Signatory Airlines in such Fiscal Year shall be reduced by the amount deposited into the Airport System Revenue Fund established under the Trust Agreements or the Airport Facilities Revenue Fund established under the Bond Resolution in such Fiscal Year from amounts accumulated in the Prepaid Airline Fees and Charges Fund established under the Bond Resolution in the previous Fiscal Year.

The debt-service owed by the AIRLINES is inversely proportional to the revenue generated by the concessions.

8. Section 13, Ch. 75-464, Laws of Florida 1975, describes the power of the AUTHORITY to enter into lease agreements with concessionaires. Subject to requiring city council approval of leases running longer than 10 years, the AUTHORITY may lease space for up to 50 years to a concessionaire and may set the terms, conditions, charges, rentals or fees *limited only* in its legislative discretion by applicable rules and regulations of the Public Service Commission of Florida.

9. AUTHORITY'S current lease with McCOY gives McCOY the privilege of operating food and beverage concessions in the new terminal until April 30, 1987, as McCOY has done in the present terminal under the lease. The lease was orginally executed in 1967, and then renewed in 1977. It granted McCOY exclusive privileges to operate all food and beverage concessions in all terminal facilities then existing, or to be built during the life of the lease. The lease also granted McCOY exclusive privileges to operate on field catering facilities for in-flight food and beverages served to airline passengers and crew for the same length of time.

10. Under the duty imposed on AUTHORITY to plan the development of new facilities by Section 7, Ch. 75-464, Laws of Florida 1975, the AUTHORITY adopted a plan dated February 2, 1978, under the title of "Orlando International Airport, Orlando, Florida, Policy for Awarding Concession and Consumer Service Privileges in The New Terminal Complex."

11. On June 1, 1978, AUTHORITY exercised the power granted it by the special acts of the Florida Legislature and entered into a written agreement with DELTA, captioned "Orlando Airline Airport Lease and Use Agreement" (AGREEMENT). Similar Agreements were entered into at substantially the same time between AUTHORITY and EASTERN, NATIONAL and REPUBLIC, respectively. DELTA, EASTERN, NATIONAL and REPUBLIC are signatory airlines to the AGREEMENT.

12. The principal purpose of the AGREEMENTS is to describe the rights of the AUTHORITY and the defendant airlines to the use of AUTHORITY'S new terminal facilities and to describe the responsibilities of each to ensure successful repayment of the debt incurred in constructing those new facilities. DELTA, EASTERN, NATIONAL and REPUBLIC are members of the Orlando Airlines Properties

Committee, chaired by one of the AIRLINES, which jointly negotiates for said airline defendants with defendant AUTHORITY based upon the desires of a majority of said airline defendants; such a majority is referred to as the Majority In Interest (MII). Subsequent to the declaratory judgment in Case No. 79-230, the AGREEMENT was used to provide control by a combination of the signatory airlines over the allocation of profits and revenue derived from airport operations and to exercise control over the AUTHORITY and its concessions in violation of the antitrust laws.

13. The AGREEMENTS between AUTHORITY and DELTA, EASTERN, NATIONAL and REPUBLIC, respectively, provide in part:

6.04 **Concession Policy.**

> Authority [Defendant] agrees that it will ordinarily take competitive bids for non-aeronautical concessions in Airport System exceeding one year and award such concession contract to the qualified, responsible bidder whose proposal shall be in the best interest of the Authority. It is agreed that if for prudent operating reasons and in accordance with Authority's Concession Policy it is desirable to depart from this procedure, any such departure shall be in accordance with the provisions of the legislative act creating the Authority and the laws of Florida after the advertised public hearing.

14. DELTA, as part of a combination with EASTERN, NATIONAL, and REPUBLIC, has sought judicial construction, in Case No. 79-230, that the aforementioned "Concession Policy" provision refers to the policy plan dated February 2, 1978, by the AUTHORITY under the caption "Orlando International Airport, Orlando, Florida, Policy for

Awarding Concession And Consumer Service Privileges In The New Terminal Complex." This Court, in Case No. 79-230, interpreted the provision in accordance with DELTA'S urgings and thereby declared that the AUTHORITY may not change the policy plan during the term of the AGREEMENTS which exceeds twenty-five years without the approval of DELTA, and apparently, the other signatories to the agreement. However, Section 13, Ch. 75-464, Laws of Florida 1975, which describes the power of the AUTHORITY to enter into lease agreements with concessionaires, makes no provision for DELTA, EASTERN, NATIONAL or REPUBLIC to direct, control, restrain, or otherwise interfere with this legislative process. Moreover, Section 7, Ch. 75-464, Laws of Florida 1975, conferred legislative discretion in the AUTHORITY to adopt a comprehensive plan for the project which "may be extended, modified, or changed by the AUTHORITY from time to time."

15. DELTA was the only member of the Orlando Airlines Properties Committee which participated in the declaratory action in Case No. 79-230. However, subsequent to that action, the defendant Airlines entered into a collective agreement with the AUTHORITY which provided that the AUTHORITY would not modify its Concession Policy without the prior approval of the defendant AIRLINES. Thereby, the defendant AIRLINES entered into a contract or combination, with the AUTHORITY, to control the concession market at the new terminal. Such agreement guarantees the power of the defendant AIRLINES to restrain trade in the new airport; such power to be exercised in conjunction with or in contravention of the AUTHORITY's business judgment.

16. AUTHORITY, DELTA, EASTERN, NATIONAL and REPUBLIC have therefore joined in an agreement to fix and establish the conditions under which competitors qualify

to seek entry into the Orlando International Airport consumer service and concession market and to limit the time at which such competitors may seek market entry. Moreover, the activities of the AIRLINES are not supervised or controlled by state policy.

17. Upon information and belief, the defendant AIRLINES plan to provide food and beverage to customers in facilities to be operated or controlled by the individual airline in the new terminal facilities now being built at the Airport. As providers of food or beverage to any person at the Airport, whether or not for a monetary charge, the AIRLINES are in competition with McCOY.

18. DELTA, EASTERN, NATIONAL and REPUBLIC are obliged, by virtue of their agreement with AUTHORITY, to pay fees and charges in amounts sufficient to pay the debt-service for the revenue bonds. These amounts are reduced by the revenues obtained by the AUTHORITY from sources other than the airline defendants. Since a significant "other sources" of revenue is the food and beverage concession, the defendant AIRLINES have expressed substantial economic interests in said concession. The AIRLINES' contract, combination, and conspiracy with the AUTHORITY substantially affects competition between the AIRLINES and the various concessionaires, including McCOY, in reference to the payments of revenues and fees to be utilized for expense and debt services by the AUTHORITY. The AIRLINES through their contract, combination or conspiracy with the AUTHORITY, are seeking to cause the concessionaires, including McCOY, to pay such substantial sums that the AIRLINES will not have to pay any Landing Fees and will have free use of the Airport over a substantial portion of the 25-year term of the Lease Agreement. To the public injury, the AIRLINES seek to maximize costs and fees charged to the general public at the Airport by the concessionaires in order to increase revenues

from the concessionaires including McCOY, and reduce the fees, if any, paid by the AIRLINES.

19. DELTA, EASTERN, NATIONAL and REPUBLIC have substantial economic interests in the operation of the food and beverage concession at the Orlando airport including the catering privileges for in-flight passengers. By virtue of their combination, and the AGREEMENTS, the defendants have economic control to allocate their costs and expenses; and have power to influence the prices of goods and services by the food and beverage concession including in-flight services. To offset a preferential catering discount to the AIRLINES for in-flight service, higher prices would be charged to "walk through' customers in the restaurant facility, thereby generating greater revenues for the AUTHORITY. This, in turn, would reduce the debt-service revenues owed by the AIRLINES. The defendant AIRLINES would benefit by reducing their debt-service obligation and by receiving a discount on in-flight food and beverages. Upon information or belief, the defendant AIRLINES desire to replace McCOY with a caterer who will charge less for items sold to the AIRLINES for in-flight consumption. In addition, the general public will be injured because a reduction in price charged to the AIRLINES for in-flight catering would cause an increase in the price charged to the general public for on-terminal food and beverage.

20. The AUTHORITY was, at all times prior to the rendition of said declaratory judgment, willing to extend McCOY's lease agreement. The AUTHORITY fully intended to award McCOY an extension. McCOY did not suffer economic injury prior to the declaratory judgment in Case Number 79-230. In the Affirmative Defense contained with the AUTHORITY's Answer to the original Complaint, the defendant AUTHORITY admitted that the "damages . . . suffered by (McCOY) result from the wrongful action taken

by DELTA and presumably with the other three Airlines to attempt to interpret the AGREEMENT in a manner foreign to the intent of all parties at the time said AGREEMENT was entered into and still contrary to the intent of [the AUTHORITY]."

21. Subsequent to the declaratory judgment in Case Number 79-230, the AUTHORITY was coerced, by the defendant AIRLINES into rejecting McCOY's proposed extension. Effective on April 2, 1980, the AIRLINES and the AUTHORITY entered into a special contract, attached as Exhibit "A" to the AUTHORITY's Amended Answer, which gave the AIRLINES power to control modifications in the AUTHORITY's Concession Policy. McCOY's injury, the loss of the present value of the extended contract was caused by the conspiracy between the AIRLINES and the AUTHORITY subsequent to the entry of the declaratory judgment. McCOY was not injured until after the court issued its declaratory judgment and the collective body of defendant AIRLINES, via the Orlando Airline Properties Committee, then coered the AUTHORITY to reject the agreed extension, despite the substantial capital investment that McCOY would have to make to the new terminal. The AUTHORITY announced its intention to award McCOY a lease extension or to accept competitive proposals as a proper exercise of its powers under the laws of Florida. Since capital improvements form part of the basis for awarding the concession and term of the Concession Lease is dependent upon the extent of the capital investment, it was deemed necessary and reasonable to extend McCOY's contract or to immediately institute the competitive proposal process in order to facilitate operations in the new terminal complex. In response, the Airlines Commitee declared to the AUTHORITY, on behalf of the combination of DELTA, EASTERN, NATIONAL, and REPUBLIC, that McCOY's extension should not be granted and that the competitive

proposal procedures should commence at such time as the AIRLINES would agree and accept; to wit, no more than fifteen months prior to the expiration of the existing food and beverage concession and that the new concession award shall be made at least six months prior to the expiration of the current concession agreement. By acquiescing to the Committee's declaration, the defendants have combined to prevent the extension of McCOY's lease or to prohibit interested concessionaires from currently bidding for a franchise to commence in 1987 in an unreasonable and unlawful restraint in trade.

22. The consumer service market served by AUTHORITY's concessionaires is limited and unique because the airport is a transfer point between commercial air carriers and between air and ground transportation, effectively capturing consumers for the service concessions available at that transfer point, such as the food and beverage concessions operated by McCOY. The relevant market consists of all concession franchises which may easily move into the Orlando International Airport.

23. DELTA, EASTERN, NATIONAL and REPUBLIC have agreed with or coerced AUTHORITY to share the scope and effect of the limited, discretionary monopoly power granted by the Florida Legislature (Section 13, Ch. 75-464, Laws of Florida 1975) solely to the AUTHORITY. The defendants have combined to prevent all interested concessionaires from bidding for a franchise to commence in 1987 and to prohibit the AUTHORITY from awarding a lease extension to McCOY. Therefore, the defendants have monopolized entry into the market of consumer service concessions at Orlando International Airport and thereby acted in unreasonable restraint of trade.

24. The combination of AUTHORITY with DELTA, EASTERN, NATIONAL and REPUBLIC, through their

respective AGREEMENTS, including the Agreement of April 2, 1980, monopolizes and unreasonably restrains trade in the distinct Orlando International Airport market for purchase and sale of exclusive franchises to operate full kitchen food and beverage concessions as are now being operated by McCOY.

25. McCOY has been injured by the loss of the lease extension which Plaintiff otherwise would have received. McCOY suffered the loss of the present value of the lease extension. An extended lease would have enhanced the value of the present agreement, protected the expectation of future profits, and enabled McCOY to amortize the substantial capital investment that must be made for building a suitable food and beverage complex in the new terminal. The conspiratorial refusal to deal adversely affects the general public in that McCOY cannot provide first-class in-terminal facilities without the assurance of an amortization period. The AIRLINES' suggestion of a buy-out provision is an illusory concept because their collective approval must first be secured.

26. DELTA, EASTERN, NATIONAL and REPUBLIC, acting individually and as the Orlando Airlines Properties Committee have enforced their Agreements with AUTHORITY to so monopolize and unreasonably restrain trade, and have declared and contracted on April 2, 1980, that no material change or amendment to the Concession Policy of February 2, 1978, as it relates to the Food and Beverage Concession, shall be made without prior majority-in-interest approval of the airlines.

27. McCOY has been injured in its business or property and will suffer irreparable harm in that it desires and has attempted to extend its lease agreement with the AUTHORITY but has been precluded from doing so by a contract or combination between the AUTHORITY and

DELTA, EASTERN, NATIONAL and REPUBLIC. Substantial income can be obtained by the successful proposer for the food and beverage concession. As operator of the current food and beverage concession, it will be necessary for McCOY to arrange a capital investment in the new airport in excess of several million dollars. Such investment is and will be jeopardized by the unlawful control the AIRLINES are exercising under their AGREEMENTS with the AUTHORITY. Without the concession being awarded at an earlier date, McCOY will lose profits and monies that it otherwise would have obtained. The activities of the defendants set forth in this complaint have a substantial effect on interstate commerce.

28. DELTA, EASTERN, NATIONAL and REPUBLIC have already exerted economic control over the concession-selection process, thereby excluding McCOY from being awarded a lease extension. The AIRLINES have used their agreement with the AUTHORITY to impede competition in bidding for the food and beverage concession. In addition, the Defendants have the potential to use their economic power to obtain favorable treatment via the selection of an "acceptable" food and beverage concessionaire. By so combining, the defendants will act in restraint of trade, thereby affecting competition in the food and beverage concession market. Upon information and belief the AIRLINES own, manage, or control or have substantial economic relationships with airport services which operate food and beverage concessions at other airports and have an economic interest in promoting the rights of a food and beverage concession with whom they have a relationship in competition with McCOY. The AIRLINES compete or seek to compete with McCOY in providing food and beverage services at the Orlando International Airport and are seeking to expand such interests.

WHEREFORE, Plaintiff demands judgment for money damages and for a permanent injunction that the defendants, their present and future officers, directors, employees and agents be perpetually enjoined, restrained, and prohibited from adhering to, renewing, maintaining or furthering, directly or indirectly, any like or similar combination and conspiracy to restrain trade and commerce in the granting of food and beverage concession rights at the Orlando International Airport, including using their AGREEMENTS with the AUTHORITY to control and prevent modification of the AUTHORITY's concession policies; that any money damages be trebled, and for costs, attorney's fees and such other relief that may be just and reasonable.

HUBERT W. WILLIAMS
Roberston, Williams, Duane,
Lewis, Briggs & Ranson, P.A.
538 East Washington Street
Orlando, Florida 32801
(305) 425-1606

FRED W. BAGGETT
Roberts, Miller, Baggett,
Laface, Richard & Wiser
101 East College Avenue
Post Office Box 1752
Tallahassee, Florida 32302
(904) 222-6891

WILLIAM VanDERCREEK
800 Two Turtle Creek Village
Dallas, Texas 75219
(214) 559-2900

*Attorneys for Plaintiff-McCoy*

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

McCOY RESTAURANTS, INC.,

*Plaintiff,*

vs.

GREATER ORLANDO AVIATION AUTHORITY,
DELTA AIR LINES, INC.,
EASTERN AIRLINES, INC.,
NATIONAL AIRLINES, INC., and
REPUBLIC AIRLINES, INC.

*Defendants.*

No. 80-87-Orl-Civ-Y

Orlando, Florida

Thursday, May 8, 1980

2:00 o'clock p.m.

## RULING OF THE COURT

Transcript of Ruling of the Court on the Motion to Dismiss had in the above-entitled cause, held on Thursday, May 8, 1980, in the United States Courthouse and Federal Building, 80 N. Hughey, Orlando, Florida, before the Honorable George C. Young, Chief United States District Judge.

THE COURT: This action of McCoy Restaurants, Inc., hereinafter called McCoy, is brought against the Greater Orlando Aviation Authority and certain airlines, Delta, Eastern, National and Republic, claiming violations of the Federal Antitrust laws.

The Defendants have filed a Motion to Dismiss which has been heard by the Court, and upon consideration of the briefs and arguments of counsel, this Court notes the following:

The Defendants contend that the claim of violation of the antitrust laws cannot now be asserted by McCoy because of res judicata, it being contended that such claim should have been raised in the prior case heard by this Court wherein Delta Airlines was the Plaintiff and McCoy was the Intervenor and the Aviation Authority was the Defendant.

In that case, Delta Airlines successfully secured an order from this Court construing that the Authority could not unilaterally change its concession policy and that the concession policy required that any concession lease be made on a competitive proposal basis if the airline, or if the Authority did not wish to proceed on competitive bids.

That action arose because of the apparent imminent likelihood that the Authority would grant to McCoy a twenty year extension of its lease for food and beverage at the new airport at the termination of the present lease which expires in 1987.

Subsequent to the entry of the order in that case, Delta sought further clarification as to this Court's ruling as to whether the Aviation Authority could seek competitive proposals now for a lease to commence in 1987 at the termination of McCoy's present lease.

After hearing testimony, this Court concluded that that would not be sound business as required by the lease

agreement with the airline, and implicit in the holding was the fact that it would make a sham of the competitive proposal proceeding because for practical purposes, no one could make a competitive proposal for a lease to commence in 1987 except the present occupant.

Now we have the present case wherein McCoy is suing the Aviation Authority and the airlines, claiming that because the actions of the airlines have resulted in what this Court concluded in the prior case is a violation of the antitrust laws, specifically because McCoy is unable to submit a competitive proposal now or to enter unilaterally into an agreement with the Aviation Authority for an extension of its lease commencing in 1987.

Plaintiff's counsel is correct that insofar as the contention of res judicata is concerned, that would apply only to Delta Airlines because the other airlines were not parties to the earlier proceeding. However, there were certain issues which McCoy had the opportunity to litigate as an Intervenor and which I think were settled by collateral estoppel.

First of all, the res judicata does apply to Delta and McCoy, and the collateral estoppel applies to the other Defendants insofar as certain issues are concerned.

One is that this Court held that the Authority did have the authority under the legislative act which created it to enter into the concession policy and to enter into an agreement with Delta that it would abide by that concession policy. The consideration for the agreement of the Authority to abide by the concession policy was among other things the agreement by Delta to advance certain monies to support the operation of the airport.

Secondly, the Court held in the prior case that the Authority could not enter into or seek competitive proposals at this time for a lease to commence in 1987.

Now, counsel for the Plaintiff in the case before us today argues that that did not preclude the airlines from agreeing with the Authority to go ahead anyway and have competitive proposals now, and that the refusal to do that constitutes a violation of the antitrust laws.

I do not have before me the order that I entered in that case, or the ruling that may have been made from the Bench, but I do not believe that the ruling contemplated that because the airlines would agree that the Authority could go ahead and take competitive proposals now. If it's unsound for the Authority to take competitive proposals at this time for a lease that is not to commence until 1987, then it's unsound whether one of the airlines wants to go ahead or not.

The Defendants also contend that this matter has been adjudicated by the prior bond validation proceedings in the state court and that since the issue of an alleged violation of the antitrust laws was not raised there, that that issue is foreclosed to McCoy. Defendant's counsel concedes that on Motion to Dismiss that that particular issue is probably premature, and I would agree.

I do not think that, as Defendants' counsel contends, that it is a matter of law and can be determined favorably to the Defendants. I am not convinced or ready to say at this time that the bond validation proceeding, which is purely a state proceeding, would necessarily foreclose raising any contention later of a violation of Federal law. I hold neither way. It's just something we won't take up at this time.

Now, Defendants also contend that there is no claim of damage which has a nexus with any acts of the Defendants. Now, the Defendants point out, and correctly, that Plaintiff is claiming damage from alleged loss that it might sustain from expenditures for capital improvements which might be lost when the lease expires in 1987.

Secondly, it is contended that there might be a loss of profits that the Plaintiffs would experience if the lease were extended after 1987.

There is no allegation of any loss already experienced and on the basis of what the Plaintiff has alleged, there could not be. And when you analyze the complaint in its totality, the last point raised by the defense counsel has merit, and that is that the complaint is alleging a future injury due to competition to McCoy, and is not alleging injury to competition.

The law is clear that the antitrust laws were designed to protect competition and not a competitor expect to the extent that a competitor suffers because of lack of competition. And the complaint is saying that the Plaintiff is going to suffer some yet undetermined injury if there is competition. That in a nutshell is what it's saying.

Therefore, based upon the allegations of the complaint as I have analyzed them, for the reasons that I have stated, the Motion to Dismiss will be granted. That which I have said from the Bench will constitute my ruling. When it is written, why, an order will be entered, attaching the transcript.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

McCOY RESTAURANTS, INC.,
*Plaintiff*

vs.

GREATER ORLANDO AVIATION AUTHORITY,
DELTA AIR LINES, INC.,
EASTERN AIRLINES, INC.,
NATIONAL AIRLINES, INC., and
REPUBLIC AIRLINES, INC.,

*Defendants.*

Case No. 80-87-Orl-Civ-Y

ORDER

This cause came before the Court for hearing on defendants' motions to dismiss the amended complaint. The ruling made from the bench, a copy of the transcript of which has been filed herein, is adopted in full except that on page 6, line 21, it should read "GOAA" instead of "the Plaintiff, McCOY Restaurants". Accordingly, it is

ORDERED that the motions to dismiss be and are hereby granted and the amended complaint is dismissed with prejudice.

DONE AND ORDERED in Chambers at Orlando, Florida, this 2nd day of June, 1980.

George C. Young
Chief Judge

TRANSCRIPT OF RULING OF THE COURT on Motions to Dismiss had in the above-entitled cause, held on FRIDAY, MAY 30, 1980, in the United States Courthouse and Federal Building, 80 North Hughey, Orlando, Florida, before the Honorable George C. Young, Chief United States District Judge.

---

THE COURT: This case now comes before the Court on Motions to Dismiss the Amended Complaint, Amended Complaint having been filed by McCoy Restaurants, Inc., the McCoy Restaurants, Inc., and Delta Air Lines, are not new behalf of the Defendant Greater Orlando Aviation Authority and Delta Air Lines, Inc., Eastern Airlines, Inc., National Airlines, Inc., and Republic Airlines, Inc.

The Amended Complaint charges alleged violations of the Federal Antitrust Laws by virtue of an alleged conspiracy between the Airline Defendants and the Greater Orlando Aviation Authority to control the concessions, awarding of concessions at the Greater Orlando International Airport.

This case comes before the Court in a different posture than the ordinary Motion to Dismiss a complaint on the bare bone pleadings. The Greater Orlando Aviation Authority and McCoy Restaurants, Inc., and Delta Airlines are not new litigants in this Court, and this Court must and can take judicial knowledge of the litigation pending and which has been determined by this Court.

In Case No. 79-230, Orlando, Civil, Delta Air Lines, Inc. sought to have this Court enter a declaratory judgment so as to interpret an agreement between Delta Air Lines and GOAA, being the abbreviated name for the Greater Orlando Aviation Authority, to determine if GOAA could unilaterally extend the concession agreement with McCoy Restaurants without any competitive bids or proposals.

That case disclosed that McCoy Restaurants has been and is operating at McCoy Airport under a lease concession agreement which is a complete monopoly in the right to sell all food and drinks of all kinds, including but not limited to hot, cold foods, snacks, soft drinks, liquors, chewing gum, mints, etc., both to passengers and other persons using the airport facilities and any flight crews.

The concession agreement by its terms runs until 1987. GOAA was about to extend or to grant a new lease agreement to McCoy for a twenty year period commencing in 1987, as previously noted. This extension or new agreement was to be without entertainment of any competitive bids or proposals, and in order to stop that procedure Delta brought the action in Case 79-230, Orlando, Civil.

After full hearing, this Court found that Delta has entered into an agreement with GOAA whereby among other things, Delta would agree to underwrite under certain circumstances amortization or a portion thereof of the bonded indebtness which was being incurred by GOAA for the purpose of constructing the new facilities at McCoy Airport. As a part of that contract between Delta and GOAA, and as a part of the consideration flowing from GOAA to Delta for the covenants entered into by GOAA, or by Delta, GOAA agreed that concessions would be let or awarded on a competitive bid basis except that under certain circumstances deviation from that competitive bidding procedure could be permitted provided that the concession policy be followed, which policy had already been established by the Greater Orlando Aviation Authority and reduced to writing, and thereby was not only in existence but by reference was made a part of the contract.

That concession policy specifically provided for competitive proposals and specifically referred to the concession of food and drink which had been and was at the time awarded to the Plaintiff here, McCoy Restaurants.

It's unnecessary for the determination in the case at bar to review those specific provisions because they were done in the Order which I entered in connection with Case 79-230. In brief, this Court further found that GOAA was bound to follow its concession policy if it did not want to have competitive bids and the concession policy required that there be competitive proposals. An Order was so entered.

I'm advised that an Appeal was taken from that, but no determination as to that Appeal has yet been made, so insofar as the rulings of this Court are concerned, I would presume that the ruling was correct.

Subsequent to that ruling, the personnel of GOAA as that authority was then constituted sought to — perhaps I should say that inquiry was made from this Court requesting clarification of its determination on the declaratory judgment issue as to whether GOAA could at this time proceed with seeking competitive proposals for a concession lease agreeement to commence in 1987 at the termination of McCoy Restaurants' present lease concession agreement. Hearing and arguments were held on that issue and the Court concluded that that was unsound business procedure and would obviate the competitive proposals requirement because there would be no competitive proposals for a lease to commence so many years from now except from the present concessionaire, McCoy Restaurants.

Subsequent to that ruling, there was an act of the legislature of which this Court must take judicial notice, which changed the personnel of the Authority, and the subsequent thereto, as alleged in the Complaint, Amended, the Airlines and the Plaintiff, McCoy Restaurant [*sic;* "GOAA"], entered into an agreement in which GOAA agreed to dismiss its Counterclaim in Case 80-7 and its Crossclaim in 80-87, and it was agreed that the Airlines would not unreasonably withhold their consent to a change in the concession policy if GOAA sought to make a change in the policy which was a part of the contract between GOAA and the Airlines.

Now the Amended Complaint really doesn't allege anything different from that which I have just related except that to understand what the Complaint, Amended Complaint is really alleging it's necessary to relate the background of this case as I have just done.

Now, the Amended Complaint goes further to allege that the actions of the Airlines constitute violation of the Antitrust Laws. It is contended that on the one hand that the Airlines have precluded the extension of the lease to McCoy Restaurants and that they will control who gets the concession in 1987, and that it is a conspiracy between GOAA and the Airlines to get a concessionaire in 1987, who will charge more money for the items sold so as to reduce the amount that the Airlines will have to pay on their agreements to underwrite the bonded indebtedness amortization.

I might note that while I stated that Delta had an agreement to underwrite and that was the basis for the suit in 79-230, Orlando, Civil, the evidence is that the other Airlines have entered into separate individual contracts with GOAA of similar if not identical provisions of that between Delta and GOAA.

In the ruling that I made on May 8, 1980, on the Motion to Dismiss at that time, I took up the issues of res judicata and collateral estoppel. I think it's unnecessary to go into those again. I think that what I said at that time is equally applicable to the Amended Complaint. Really the only substantial difference there between the original Complaint and the Amended Complaint is this claim of this conspiracy that I've just related and the claim of loss of present value of the lease, extension of the lease for twenty years to commence in 1987.

Now, if in 1987 the Airlines and GOAA were entered into a conspiracy to award a concession agreement only to someone who would charge high prices so as to minimize or completely

eliminate the requirement for contributions from the Airlines, that might — and I only say might; it is not an issue before me; hopefully by 1987 will not be — constitute a violation of the law. But we are not dealing with 1987. We are dealing with 1980.

The only fact that can be drawn from the Amended Complaint is that McCoy Restaurants is not complaining about there being a lack of competition or a conspiracy in 1980 to prevent competition, but the complaint is that by allegedly illegal actions the Defendants are keeping McCoy Restaurants from having an extension of its lease to commence in 1987. The complaint really is that the Plaintiff is opposed to competition and to competitive proposals. That has been the history of this case and its related cases.

Now, as to the alleged illegal activities, it is alleged that it's illegal because an action was brought in this Court. It's alleged that it was illegal because the Airlines have in the agreement with GOAA the right to require GOAA to comply with the provisions of the contract. On the one hand the Complaint, Amended Complaint and the brief in support thereof sets forth that GOAA is a creature of the legislature as, of course, it is, and that it's given authority to enter contracts. And then on the other hand, the Plaintiff takes the position that because the contract provides that GOAA must abide by the terms of the contract, to wit, enter into competitive proposals for the awarding of concessions, that that is somehow an illegal delegation of its authority from GOAA to the Airlines. Neither the contract nor the concession policy gives to the Airlines the authority to select the concessionaire. Nothing that this Court has held says the Airlines have any right to select or to have any voice in the selection of the concessionaire. Merely the sum total of all rulings has been that there must be competition, a ruling to which the Plaintiff has consistently objected.

Now, just a word about Noerr-Pennington and California Retail Liquor Dealers Association. I think that in the facts of this case the rulings of Noerr — the principles of Noerr-Pennington apply and not California Retail Liquor Dealers Association. The rulings to which the Plaintiff objects are the rulings of the Court and not of the Airlines.

By a type of legerdemain the brief of the Plaintiff states that the Airlines are not under State control, their actions are not State regulated, so that California Retail Liquor Dealers Association applies. Well, the Airlines are not the ones making the decision as in California Retail Liquor Dealers Association. It's the Court that's making the decision, and that comes under Noerr-Pennington. Regardless of whether res judicata or collateral estoppel is applicable, it's my conclusion that this Amended Complaint does not state a claim upon which relief can be granted, and I think that what I said from the Bench at the last Hearing is equally applicable today, and I quote, "The law is clear that the Antitrust Laws were designed to protect competition and not a competitor except to the extent that competitor suffers because of lack of competition. And the Complaint is saying that the Plaintiff is going to suffer some yet undetermined injury if there is competition. That in a nutshell is what it's saying."

And the Amended Complaint, while longer in length, the inside of the nutshell remains the same.

The Motions to Dismiss will be granted. That which I have stated from the Bench will constitute the Ruling, transcript being attached to my Ruling, and the Amended Complaint will be dismissed with prejudice.

(The Hearing was concluded at 9:50 o'clock a.m.)

JUDGMENT ON DECISION BY THE COURT

# United States District Court

FOR THE

MIDDLE DISTRICT OF FLORIDA —
ORLANDO DIVISION

MC COY RESTAURANTS, INC.

vs.

GREATER ORLANDO AVIATION AUTHORITY, et. al.

CIVIL ACTION FILE No.
80-87-Orl-Civ-Y

## JUDGMENT

This action came on for (hearing) before the Court, Honorable, GEORGE C. YOUNG, Chief, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff take nothing and that this action be and is hereby dismissed.

Dated at Orlando, Florida, this 3rd day of June, 1980.

Wesley R. Thies
Clerk of the Court

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-5462

McCOY RESTAURANTS, INC.,

*Plaintiff-Appellant,*

versus

GREATER ORLANDO AVIATION AUTHORITY, ET. AL.,

*Defendants-Appellees.*

Appeal from the United States District Court for the Middle District of Florida

(April 22 1981)

Before MILLER,* FRANK M. JOHNSON, JR., and THOMAS A. CLARK Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d. 966.

*Judge of the United States Court of Customs & Patent Appeals, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-5462

McCOY RESTAURANTS, INC.,

*Plaintiff-Appellant,*

versus

GREATER ORLANDO AVIATION AUTHORITY, ET AL.,

*Defendants-Appellees.*

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(July 14, 1981)

Before MILLER* and FRANK M. JOHNSON, JR. and THOMAS A. CLARK, Circuit Judges.

*Judge of the United States Court of Customs & Patent Appeals, sitting by designation.

PER CURIAM:

On April 22, 1981, we affirmed the district court's decision without writing an opinion. The district court had based its decision on three grounds, res judicata and related concepts, state action exemption, and failure to state a claim under the federal antitrust laws. The res judicata ground for the decision arose from an earlier judgment rendered by the trial court in another lawsuit between Delta, McCoy, and the Airport Authority. The judgment in this latter lawsuit was vacated by an order of this court in its case No. 80-5160 because of mootness in that Delta and the Aviation Authority had settled the lawsuit pending appeal. The settlement did not include McCoy.

To remove any possibility of misunderstanding about the effect of our decision rendered without opinion in this case, we point out that the affirmance was not based on the ground of res judicata, but on the other two grounds contained in the district court's order.

The other contentions contained in the petition for rehearing have been considered and are denied.

# Supreme Court of the United States

No. A-271

McCOY RESTAURANTS, INC.,

*Petitioner*

v.

GREATER ORLANDO AVIATION AUTHORITY, ET. AL.

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 11, 1981

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 2nd day of October, 1981

# Opposition

# 1

Office - Supreme Court, U.S.
FILED
DEC 15 1981
CLERK

No. 81-888

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

MCCOY RESTAURANTS, INC.,
*Petitioner,*

vs.

GREATER ORLANDO AVIATION AUTHORITY, DELTA AIR LINES, INC., EASTERN AIRLINES, INC., REPUBLIC AIRLINES, INC., NATIONAL AIRLINES, INC., and PAN AMERICAN WORLD AIRWAYS, INC., as Successor in Interest to NATIONAL AIRLINES, INC.,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Now the Eleventh Circuit)

## BRIEF OF RESPONDENT AIRLINES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD H. SINKFIELD
*Counsel of Record for Respondent Airlines*

and

PHILLIP S. MCKINNEY
*Counsel for Respondent Airlines*

ROGERS & HARDIN
A Partnership of
Professional Corporations
Thirty-Second Floor
101 Marietta Tower
Atlanta, Georgia 30335
(404) 522-4700

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

## QUESTIONS PRESENTED FOR REVIEW

1. Whether a complaint which alleges, in sum and substance, that Defendants have acted individually and in concert to introduce competition in the relevant market may be dismissed for failure to state a claim in that it fails to allege any injury to competition.

2. Whether a complaint which alleges that a plaintiff has lost or may lose an economic expectancy as a direct and proximate result of the operation of competition and not acts injurious to competition in the relevant market may be dismissed for failure to allege an actual or threatened injury cognizable under the federal antitrust laws.

3. Whether a complaint which alleges that Defendants acted individually and in concert to obtain a judicial interpretation and enforcement of the policies, rules and regulations of a governmental entity, standing alone and as incorporated in an agreement between the governmental entity and the private persons, may be dismissed for failure to state a claim in that such allegations (on their face) show nothing more than the exercise of a fundamental legally protected right to seek and obtain judicial redress.

4. Whether a complaint which alleges that private parties incorporated a provision of a judicial order and judgment directly applicable to and binding upon them into a settlement agreement disposing of that litigation between them may be dismissed for failure to state a claim where the agreement among the individuals is merely a consensual expression of their willingness to do voluntarily what they were otherwise ordered by the Court to do.

5. Whether the Court of Appeals may affirm the judgment of the District Court after full briefing and oral argument but without a full written opinion where the issues presented on appeal were deemed by the Court of Appeals to be insubstantial and where that Court determined that a written opinion would have no precedential value.

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# No. 81-888

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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McCOY RESTAURANTS, INC.,
*Petitioner,*

vs.

GREATER ORLANDO AVIATION AUTHORITY, DELTA AIR LINES, INC., EASTERN AIRLINES, INC., REPUBLIC AIRLINES, INC., NATIONAL AIRLINES, INC., and PAN AMERICAN WORLD AIRWAYS, INC., as Successor in Interest to NATIONAL AIRLINES, INC.,
*Respondents.*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Now the Eleventh Circuit)

## BRIEF OF RESPONDENT AIRLINES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATUTES AND ORDINANCES

This case involves, peripherally, the Greater Orlando Port Authority Act of 1957, Chapter 57-1658 of the laws of Florida, 1975, as amended by Chapter 75-464 of the laws of Florida, 1975. The relevant provisions of these laws are reproduced in the Appendix to this Brief.

## STATEMENT OF THE CASE

### Preliminary Statement and Proceedings Below.

This action is before the Court on the petition of McCoy Restaurants, Inc. (hereinafter referred to as "McCoy") for a writ of certiorari from the affirmance on appeal of an order dismissing McCoy's purported Antitrust Complaint and Amended Complaint for failure to state a claim upon which relief may be granted.

Reduced to their simplest terms, the Complaints alleged that the Respondents[1], in concert with each other, persuaded the Authority to adhere to a certain "Concession Policy" that *introduced* an element of competition into the contract-letting process for awarding the exclusive food and beverage concession rights at the Orlando International Airport (hereinafter referred to as the "Airport"). The Concession Policy complained of expressly provides for competitive bidding or competitive proposals in connection with the letting of such concession contracts at the Airport. The asserted "anti-competitive" acts of the Respondents consist of their alleged concerted acts in persuading the Authority to adhere to the Concession Policy and in resorting to a lawsuit to prevent the Authority from awarding an extension of McCoy's exclusive rights in violation of the Concession Policy's competitive bid requirements. The Complaints further alleged that McCoy sustained an injury to its business or property as a result of the competitive bidding requirement contained in the Concession Policy and its enforce-

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[1] Delta Air Lines, Inc. (hereinafter referred to as "Delta"), Eastern Airlines, Inc. (hereinafter referred to as "Eastern"), Pan American World Airways, Inc. (the successor in interest to National Airlines, Inc.; hereinafter referred to as "Pan Am") and Republic Airlines, Inc. (hereinafter referred to as "Republic"), collectively referred to hereinafter as the "Airlines", and the Greater Orlando Aviation Authority (hereinafter referred to as the "Authority").

ment by the Authority. Additionally, this Concession Policy is alleged to have deprived or threatened to deprive McCoy of the monopolistic advantage that it has historically enjoyed in Orlando as the sole provider of food and beverage concessions at the Airport since 1946.

In other words, McCoy asserts that but for the Authority's adherence to the competitive bidding policy, McCoy would have obtained successive extensions of its concession leases at the Airport, or at any new or expanded Airport facilities in the Orlando area, without fear, concern or risk of loss of such concession rights at any time in the foreseeable future by reason of the operation of competitive market forces.

The District Court below correctly determined that the gravamen of McCoy's Complaints presented nothing more than the simplistic distillation noted above. The District Court accordingly applied the applicable legal principles which mandated the dismissal of the Complaint and Amended Complaint for their respective failures to state a claim upon which relief may be granted as a matter of law. The Court of Appeals properly affirmed this dismissal on appeal, based upon the District Court's holdings that: (1) McCoy has alleged no injury to competition, (2) McCoy has alleged no causal connection between the alleged antitrust violation and the alleged injury to McCoy, and (3) McCoy's Amended Complaint fails to state a claim upon which relief may be granted because the alleged conduct of the Airlines is privileged by the First Amendment as applied under the *Noerr-Pennington* doctrine.

**Statement of Facts**[2]

"...McCoy...is a corporation, incorporated under the laws of Florida, which operates a food and beverage concession at

[2] The "facts" set forth in this Statement of Facts are taken virtually verbatim from the Petitioner's Amended Complaint in order to focus attention on the specific portions of the complaint which purport to allege antitrust violations—but which fail to state a claim, as a matter of law. The Respondents, of course, disagree with many of these allegations, but they must be taken as true for purposes of a motion to dismiss.

Orlando International Airport in Orlando, Florida. [The]...AUTHORITY... is an agency of the City of Orlando created by special acts of the Florida Legislature, particularly Ch. 57-1658, Laws of Florida 1957, as amended by Ch. 75-464, Laws of Florida 1975, for the purposes of constructing, establishing, improving and operating (among others) certain aviation facilities including Orlando International Airport. ...DELTA is a corporation, incorporated under the laws of Delaware, which engages in interstate aviation commerce to and from said Airport. ...EASTERN...is a corporation incorporated under the laws of Delaware, which engages in interstate aviation commerce to and from said Airport. ...REPUBLIC...is a corporation, incorporated under the laws of Wisconsin, which engages in interstate aviation commerce to and from said Airport. ...NATIONAL...is a corporation, incorporated under the laws of Florida, which engages in interstate aviation commerce to and from said Airport. ...Pan American Airways, Inc. is the successor-in-interest to National Airlines, Inc. Pan American Airlines, Inc. and National Airlines, Inc. shall be collectively referred to as NATIONAL. The ... Airlines shall be collectively referred to as AIRLINES." Amended Complaint, Paragraph 2, A-24-25 (pages 24-25 of the Appendix submitted by the Petitioner).[3]

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[3] It is obvious on brief review of the allegations of many paragraphs of the Amended Complaint that they *do not* purport to allege proscribed antitrust activity but merely provide jurisdictional or background information. In other instances these allegations are...in language or substance, merely repetitious of previous paragraphs. In the interest of brevity, some of these paragraphs will simply be footnoted as such and eliminated from further argument or consideration on the dismissal issues. Additionally, some of the paragraphs are included herein in a different sequence than they appeared in the Amended Complaint. This is done primarily to aid the chronological flow of the alleged facts.

McCoy currently holds a lease at the Airport for the food and beverage concession.[4]

"[The] AUTHORITY'S current lease with McCoy gives McCoy the privilege of operating food and beverage concessions in the new terminal until April 30, 1987, as McCoy has done in the present terminal under the lease. The lease was originally executed in 1967, and then renewed in 1977. It granted McCoy exclusive privileges to operate all food and beverage concessions in all terminal facilities then existing, or to be built during the life of the lease. The lease also granted McCoy exclusive privileges to operate on field catering facilities for in-flight food and beverages served to airline passengers and crew for the same length of time." Amended Complaint, Paragraph 9, A-28.

On February 2, 1978, the AUTHORITY, pursuant to "the duty imposed" on it under Florida law, adopted a plan entitled "Orlando International Airport, Orlando, Florida, Policy for Awarding Concession and Consumer Service Privileges in The New Terminal Complex." Amended Complaint, Paragraph 10, A-28. This Plan as adopted by the AUTHORITY contained a "Concession Policy" which provided in pertinent part:

> "There are three ways in which concession and consumer service privileges may be awarded:
>
> 1. Competitive bidding to specifications.
>
> 2. Invitational but competitive proposals, based on specifications, followed by negotiations with the selected proposer(s) to obtain maximum revenue consistent with desired levels of public service.

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[4] McCoy has held the sole and exclusive food and beverage concession at the Airport, without any competitive bidding process, since 1946.

3. Negotiation with a single concession/service operator (a) where services or products are unique or (b) where services are sole source in accordance with state law or regulation."[1]

"On June 1, 1978, AUTHORITY exercised the power granted it by the special acts of the Florida Legislature and entered into a written agreement with DELTA, captioned 'Orlando Airline Airport Lease and Use Agreement' (AGREEMENT). Similar Agreements were entered into at substantially the same time between AUTHORITY and EASTERN, NATIONAL and REPUBLIC, respectively. DELTA, EASTERN, NATIONAL and REPUBLIC are signatory airlines to the AGREEMENT." Amended Complaint, Paragraph 11, A-28.

The AGREEMENTS between AUTHORITY and DELTA, EASTERN, NATIONAL and REPUBLIC contain a provision which, in essence, incorporates the AUTHORITY'S Concession Policy. It provides in pertinent part:

"6.04 Concession Policy

Authority...agrees that it will ordinarily take competitive bids for non-aeronautical concessions in Airport System exceeding one year and award such concession contract to the qualified, responsible bidder whose proposal shall be in the best interest of the Authority. It is agreed that if for prudent operating reasons and in accordance with Authority's Concession Policy it is desirable to depart from this pro-

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[1] This policy is referred to but not quoted in the Amended Complaint.

> cedure, any such departure shall be in accordance with the provisions of the legislative act creating the Authority and the laws of Florida after advertised public hearing." Amended Complaint, Paragraph 13, A-29.

On or about May 17, 1979, Delta filed suit against the Authority in the United States District Court for the Middle District of Florida, Orlando Division, Case No. 79-230-ORL-CIV-Y (hereinafter referred to as "Case No. 79-230"), seeking declaratory and injunctive relief.[6]

McCoy's Amended Complaint described Case No. 79-230 as follows:

> "DELTA, as part of a combination with EASTERN, NATIONAL, and REPUBLIC, has sought judicial construction, in Case No. 79-230, that the aforementioned "Concession Policy" provision refers to the policy plan dated February 2, 1978, by the AUTHORITY under the caption 'Orlando International Airport, Orlando, Florida, Policy for Awarding Concession And Consumer Service Privileges In The New Terminal Complex.' *This Court [the District Court], in Case No. 79-230, interpreted the provision in accordance with DELTA'S urgings and thereby declared that the AUTHORITY may not change the policy plan during the term of the AGREEMENTS which exceeds*

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[6] This suit was the first of several suits filed among these parties concerning this and related concession issues. This suit is repeatedly referred to in the Amended Complaint as forming the nucleus of the alleged "anti-competitive" conduct. Delta filed Case No. 79-230 after learning that McCoy was seeking to obtain, in violation of the Concession Policy, an additional twenty-year negotiated extension of the current lease now set to expire in 1987.

*twenty-five years without the approval of DELTA, and apparently, the other signatories to the agreement.*'"[7] (Emphasis added). Amended Complaint, Paragraph 14, A-29-30.

"DELTA was the only member of the Orlando Airlines Properties Committee which participated in the declaratory action in Case No. 79-230.[8] However, subsequent to that action, the . . . Airlines entered into a collective agreement with the AUTHORITY which provided that the AUTHORITY would not modify its Concession Policy without the prior approval of the . . . AIRLINES. Thereby, the . . . AIRLINES entered into a contract or combination, with the AUTHORITY, to control the concession market at the new terminal. Such agreement guarantees the power of the AIRLINES to restrain trade in the new airport; such power to be exercised in conjunction

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[7] The last two sentences of this paragraph are not quoted. They assert that the AUTHORITY was somehow limited in its power to include the Concession Policy in the Agreements. As such, they purport to disagree with the District Court's determinations in Case No. 79-230. Similar allegations are set forth in paragraphs 5, 6, 8, 23, 26, 27 and 28 of the Amended Complaint.

[8] After the District Court's decision from the bench in the declaratory judgment action but prior to the entry of judgment, McCoy attempted to induce the AUTHORITY to subvert that decision by going through the sham of purportedly placing the food and beverage concession rights up for competitive bidding at a point in time more than seven years prior to the commencement of such rights. The obvious purpose for this sham procedure was to ensure that only McCoy would submit a bid for such extension. Upon learning of this ruse, Delta filed a motion seeking to enjoin this sham "bid-letting." The matter came on for hearing before the Court and an order and judgment was entered providing, among other things, that competitive proposals should be solicited only within a reasonable time prior to the April 1987 expiration date of the current McCoy Lease.

with or in contravention of the AUTHORITY'S business judgment."[9] Amended Complaint, Paragraph 15, A-30 (emphasis added).

"AUTHORITY, DELTA, EASTERN, NATIONAL and REPUBLIC have therefore joined in an agreement to fix and establish the conditions under which competitors qualify to seek entry into the Orlando International Airport consumer service and concession market and to limit

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[9] The "Collective Agreement" referred to in Paragraphs 15 and 21 of the Amended Complaint, but not quoted, was a Settlement Agreement reached by the Authority and the Airlines settling and disposing of all litigation between them. That Settlement Agreement provides in pertinent part that:

> "4. *GOAA [the Authority] shall amend its Concession Policy referred to in the Agreement so as to provide that nothing in said Policy shall preclude a corporation, firm or individual authorized to do business in the State of Florida from submitting a bid or a proposal for the award of contracts or concessions at the Orlando International Airport;* provided, however, that GOAA shall adopt such reasonable eligibility requirements as are necessary to insure that the parties allowed to bid are likely to have the capability of providing the desired goods and services. The parties agree to cooperate in drafting revisions to the Concession Policy to accomplish this purpose. Except as provided herein, and except as it may be modified by subsequent written agreement between the parties, the Concession Policy is reaffirmed as incorporated within the Agreement at Paragraph 6.04 and shall remain in full force and effect. The Signatory Airlines shall, *however, consider in good faith all subsequent proposals by GOAA to amend the Concession Policy and shall not unreasonably withhold their consent thereto.* "5. The parties agree that the Court's Orders and Judgments heretofore entered in the 79-230 case shall be deemed final and binding upon GOAA and that no appeal thereof will be taken by GOAA." Record 330-331. (Emphasis added).

The "good faith" provision at the end of paragraph 4 actually constitutes a liberalization of the Authority's right to change its Concession Policy in comparison to the District Court's holding in Case No. 79-230.

the time at which such competitors may seek market entry. Moreover, the activities of the AIRLINES are not supervised or controlled by state policy." Amended Complaint, Paragraph 16, A-30-31.

"The combination of AUTHORITY with DELTA, EASTERN, NATIONAL and REPUBLIC, through their respective AGREEMENTS, including the Agreement of April 2, 1980, monopolizes and unreasonably restrains trade in the distinct Orlando International Airport market for purchase and sale of exclusive franchises to operate full kitchen food and beverage concessions as are now being operated by McCoy."[10] Amended Complaint, Paragraph 24, A-34-35.

"The AUTHORITY was, at all times prior to the rendition of said declaratory judgment, willing to extend McCoy's lease agreement. The AUTHORITY fully intended to award McCoy an extension. *McCoy did not suffer economic injury prior to the declaratory judgment in Case Number 79-230.*

* * *

McCoy's injury, the loss of the present value of the extended contract, was caused by the conspiracy between the AIRLINES and the AUTHORITY subsequent to the entry of the declaratory judgment. McCoy was not injured until

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[10] McCoy's allegations in the above Paragraphs and Paragraphs 9, 17, 19, and 28 purport to set forth the alleged antitrust activities of the Airlines. As is readily apparent, in sum and substance, the allegations merely show that the Authority and the Airlines sought to introduce competition or competitive bidding into the procedures of awarding food and beverage franchises. Certainly, such alleged conduct does not injure competition or violate the antitrust laws.

> after the court issued its declaratory judgment and the collective body of ... AIRLINES, via the Orlando Airline Properties Committee, then coerced the AUTHORITY to reject the agreed extension, despite the substantial capital investment that McCoy would have to make to the new terminal."[11] Amended Complaint, Paragraphs 20 and 21, A-32-34.

Following the filing of the initial complaint in this case, the Respondents filed a Motion to Dismiss for failure to state a claim upon which relief may be granted. The parties briefed the relevant issues extensively. The District Court heard lengthy oral arument on the motion, after which the Court rendered its decision and opinion granting the motion. A-38-42. At the conclusion of that hearing, the Court granted McCoy leave to file an amended complaint if it felt that it could remedy the defects.

McCoy filed its Amended Complaint some ten days later. A-24-37. The Respondents again moved to dismiss, on essentially the same grounds as before. The parties submitted additional briefing and the Court again heard lengthy oral argument. The Court ruled that the Amended Complaint also failed to state a claim and rendered its decision granting the motion, this time with prejudice. A-43-49.

McCoy appealed the dismissal to the Fifth Circuit. The parties submitted briefs totalling more than 125 pages. The Court heard full oral argument of the appeal on April 21, 1981. The

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[11] The underscored language, again, clearly shows that the limitation, if any, resulted from the court's interpretation of the Concession Policy and the Use Agreements. This ruling was rendered before, and was in full force and effect at the time the Authority entered into the Settlement Agreement with the Airlines. These facts make it undisputedly clear that the injury that McCoy alleges to have resulted from the limitation on the Authority flows directly and proximately from the District Court's ruling and *not* from any alleged concerted action of the Airlines.

next day, the Court entered its *per curiam* affirmance under Local Rule 21, indicating a determination that no error of law appeared and that an opinion would have no precedential value. A-51.

McCoy filed a petition for rehearing, together with further briefing of the issues. The Court considered McCoy's petition but denied it on July 14, 1981. A-52-53. The Court did, however, file a short *per curiam* opinion briefly explaining the grounds upon which the District Court's judgment had been affirmed. A-53.

The dismissal of McCoy's Complaint, having now been considered twice by the District Court and twice by the Court of Appeals, was clearly correct, for the reasons set forth below.

**Summary of Argument**

McCoy holds the exclusive food and beverage concession at the Airport through April 30, 1987. During 1979, McCoy sought to extend this exclusive concession for an additional 20 years (until 2007) through negotiations with the Authority. In order to compel compliance with the Authority's competitive bidding policies, Delta successfully sought a judicial declaration as to the impropriety of the non-competitive negotiations between McCoy and the Authority. The District Court, in that action, held that the Authority could not award McCoy's proposed lease extension without seeking competitive bids or competitive proposals, and that such bids or proposals could not be sought until 1986 or 1987 because no true competitive conditions could exist if those concession rights were offered seven or eight years in advance of their effective date.

The Amended Complaint alleges that the Airlines and the Authority have conspired to deprive McCoy of the 20-year extension that it would have gotten but for the intervention of the Airlines and their subsequent efforts to enforce the Authority's competitive bidding policies. McCoy's harm is alleged to be the

loss of the "present value" of the lease extension that it would have received (commencing in 1987) had it been permitted to negotiate that extension without the imposition of competitive conditions.

This petition raises no novel or important questions of federal law, nor does any ruling of the courts below conflict with any other decision in any other circuit. Thus, there is no special or important reason for granting the writ.

Moreover, the decision of the Court of Appeals was correct under the well-settled standards and rules of law applicable to the questions presented. The Amended Complaint fails to state a claim upon which relief may be granted, for three separate and independent reasons, any one of which is sufficient to uphold the affirmance of the District Court's judgment:

1. The Amended Complaint alleges no injury to competition; rather, it complains that McCoy has been compelled to submit its proposed extension to competitive bidding, and thus it complains of *increased* competition in the Airport concession rights market.

2. The Amended Complaint alleges no antitrust injury to McCoy; rather, the alleged loss of the "present value" of the lease extension is a loss attributable to the increased competition of the competitive bidding requirements, and not to some artificial hindrance to McCoy's ability to compete.

3. The Amended Complaint alleges nothing more than joint efforts by the Airlines to influence and enforce the official Concession Policy of the Authority, an agency of the City of Orlando, Florida, and resort to judicial resolution once efforts at persuasion proved futile. This conduct is protected by the First Amendment and the *Noerr-Pennington* doctrine.

Thus, McCoy can prove no set of facts in support of these claims that would entitle it to relief. For each of the foregoing reasons, or for any one of them, the judgment of the Court of Appeals was correct.

## ARGUMENT

### Point I

### The Petition Points To No Special Or Important Reasons For Review By This Court.

The considerations governing review by this Court on writ of certiorari are set forth in Rule 17.1 of this Court's Rules:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are *special and important reasons therefor.* The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> " . . . .
>
> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." (Emphasis added).

This case deals with no novel questions of federal law: it is simply a case in which well-established legal standards have been applied to the Amended Complaint at issue here. No court below has differed in any respect with any other circuit as to the applicable standard; indeed, the affirmance was *per curiam* without a written opinion. Thus, there is no conflict among the circuits requiring resolution by this Court.

The only issue presented by McCoy's Petition is whether the district court and the Fifth Circuit have reached the correct conclusion as to the legal sufficiency of the Complaint in this case. McCoy seeks to have this Court take a third look at the sufficiency of the allegations of the complaint, and thus to re-engage in the mere application of well-settled law to the alleged facts of the Amended Complaint. This is hardly the sort of "special and important reason" envisioned by Rule 17.1.

## Point II

## The Appeal Was Correctly Decided Below

### A. The Standard Of Review

It is well established that a party seeking dismissal of a complaint for failure to state a claim upon which relief may be granted carries a difficult - but not impossible - burden. *Webb* v. *Standard Oil Co.*, 414 F.2d 320 (5th Cir. 1969). In the seminal case of *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), this Court held that:

> "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

It is, however, equally fundamental, on consideration of motions to dismiss, that a Court need not accept any allegations that are mere "legal conclusions," *Associated Builders, Inc.* v. *Alabama Power Co.*, 505 F.2d 97 (5th Cir. 1974), "unsupported conclusions," *Stanton* v. *United States*, 434 F.2d 1273 (5th Cir. 1970), "unwarranted inferences," *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968 (8th Cir.), *cert. denied*, 395 U.S. 961 (1968), "unwarranted deductions," *Id.*, or "sweeping legal conclusions cast in the form of factual allegations." *Pauling* v. *McElroy*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). And, although the court must, of course, accept all well-pleaded allegations in the complaint as true, a mere allegation that the

defendants have violated the antitrust laws is not enough. *Klebanow* v. *New York Produce Exchange*, 344 F.2d 294 (2nd Cir. 1965); *BusTop Shelters, Inc.* v. *Convenience & Safety Corp.*, 521 F.Supp. 989 (S.D.N.Y. 1981).

On application of these standards, one readily concludes that McCoy's Amended Complaint has failed, *as a matter of law*, to state a claim upon which relief may be granted, for three separate and independently determinative reasons. The District Court and Court of Appeals were correct in so holding.

### B. The Amended Complaint Fails To State A Claim Upon Which Relief May Be Granted Because It Alleges No Injury To Competition

The basic policy goal of the Sherman Act and the Clayton Act is to protect and foster competition. The remedy that these laws provide to competitors for injuries to their business property is limited to or available only where the competitor's injury proximately results from (or is threatened to result from) a proscribed injury to competition. Where the injury allegedly results from or is threatened by *increased competition*, no claim for relief under the antitrust laws has been stated.[12]

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[12] It is well established that a dismissal for failure to allege the required injury to competition is appropriate under Federal Rule of Civil Procedure 12(b)(6). See, *e.g.*, *Havoco of America, Inc.* v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980); *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 1980-2 Trade Cases, ¶63,515 (1st Cir. 1980); *Bosse* v. *Crowell Collier and MacMillan*, 565 F.2d 602 (9th Cir. 1977); *Jarmatt Truck Leasing Corp.* v. *Brooklyn Pie Company, Inc.*, No. 81C-357 (E.D.N.Y., 10-29-81) (slip opinion); *Aurora Enterprises, Inc.* v. *National Broadcasting Company*, No. 81-445 AWT (C.D.Calif., 10-20-81) (slip opinion); *BusTop Shelters, Inc.* v. *Convenience & Safety Corp.*, 521 F.Supp. 989 (S.D.N.Y. 1981); *American Hospital Supply Corp.* v. *Roy Lapidus, Inc.*, 493 F.Supp. 1076 (D. Mass. 1980); *Marchwinski* v. *Oliver Tyrone Corp.*, 83 F.R.D. 606 (W.D. Pa. 1979); *Outboard Marine Corp.* v. *Pezetel*, 461 F.Supp. 384 (D.Del. 1978); *A.G.S. Electronics, Ltd.* v. *B.S.R. (U.S.A.), Ltd.*, 460 F.Supp. 707 (S.D.N.Y. 1978).

In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court articulated and applied this basic concept of the necessity for an injury to competition. There, Brunswick had acquired several bowling centers that had defaulted in payments for bowling equipment purchased form Brunswick. These centers were competitors of Pueblo. Pueblo challenged the acquisitions under Clayton Act §7, claiming that the acquired bowling centers, Pueblo's competitors, would have gone out of business had Brunswick not acquired them, and that Pueblo had therefore suffered injury to its business or property in that its profits would have increased but for Brunswick's unlawful conduct. This Court held that such a claim is not cognizable under Clayton Act §4.

> "At base, respondents complain that by acquiring the failing centers petitioner *preserved competition,* thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. *The antitrust laws, however, were enacted for 'the protection of competition, not competitors'* . . . .It is inimical to the purpose of these laws to award damages for the type of injury claimed here."

*Id.* at 488. (Emphasis added).

The damage claim rejected in *Brunswick* is precisely that sought to be asserted by McCoy. McCoy complains here of the "introduction of competition" into the relevant market (i.e. the enforcement of competitive bidding or proposal procedures). The applicability of *Brunswick* to this case is more vividly illustrated by substituting McCoy and its allegations for those of *Brunswick* in the above quote.

> "At base, [McCoy] complain[s] that by [enforcing the competitive bidding and proposal requirements the Respondents *introduced] competition,* thereby depriving [McCoy] of the benefits of [its monopoly position]. The

> damages [McCoy seeks] are designed to provide [it] with the profits [it] would have realized had competition been reduced. *The antitrust laws, however, were enacted for 'the protection of competition, not competitors'* . . . .It is inimical to the purposes of these laws to award damages for the type of injury claimed here."

As this Court further stated,

> "it is quite clear that if respondents were injured, it was not 'by reason of anything forbidden in the antitrust laws' . . . ."

*Ia.* at 488. McCoy's Amended Complaint was properly dismissed.

McCoy asserts that the Court of Appeals decision conflicts with *Radovich* v. *National Football League,* 352 U.S. 445 (1957), and *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.,* 364 U.S. 656 (1961), which McCoy asserts hold that a complaint need only allege an antitrust violation and that the plaintiff was injured thereby. Those cases, unlike the case at bar, dealt with complaints whose factual allegations clearly showed an anticompetitive restraint on competition in the relevant market. Nothing in the holdings of those cases suggests that injury to competition need not be alleged, since that is an element of the "antitrust violation" of which those cases clearly require proof. But even if the early cases could be so read, that is not the law after *Brunswick* and its progeny.

The requirement that the pleaded facts must demonstrate an injury to competition in the relevant market and not merely some injury to a "competitor" has been upheld not only by this Court in *Brunswick* but also be every other court that has considered the question. *See, e.g., Havoco of America, Ltd.* v. *Shell Oil Co.,* 626 F.2d 549 (7th Cir. 1980); *Almeda Mall, Inc.* v. *Houston Lighting & Power Co.,* 615 F.2d 343 (5th Cir.), *cert. denied,* 449 U.S. 870 (1980); *Parmalee Transportation Co.* v. *Keeshin,* 292 F.2d 794 (7th Cir.), *cert. denied,* 368 U.S. 944

(1961); *Ackerman-Chillingworth, Division of Marsh & McLennon, Inc.* v. *Pacific Electrical Contractors Association,* 579 F.2d 484, 492 (9th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979); *A.D.M. Corp.* v. *Sigma Instruments, Inc.,* 1980-2 Trade Cases, ¶63.515 (1st Cir. 1980); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.,* 553 F.2d 620, 627 (9th Cir. 1977); *Bosse* v. *Crowell Collier and MacMillan,* 565 F.2d 602 (9th Cir. 1977); *American Family Life Assurance Co. of Columbus* v. *Blue Cross of Florida, Inc.,* 486 F.2d 225, 229 (5th Cir. 1973), *cert. denied,* 416 U.S. 905 (1974); *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania,* 481 F.2d 80 (3rd Cir.), *cert. denied,* 414 U.S. 1093 (1973); *BusTop Shelters, Inc.* v. *Convenience & Safety Corp.,* 521 F.Supp. 989 (S.D.N.Y. 1981); Areeda, "Antitrust Violations Without Damage Recoveries," 89 Harv. L. Rev. 1127, 1134 (1976) ("Thus, as long as there is no anticompetitive activity, the fact of injury to a competitor is *not* a concern of the antitrust laws").

Under these principles, the lodestar upon which analysis of the Amended Complaint must fix is the fact that the *only* conduct of the Respondents that McCoy complains of relates to acts that introduced competition. First, the Authority adopted a Concession Policy which contained a competitive procedure. Second, this pro-competition policy was incorporated into the Airport Agreements with the Authority. Third, Delta sought and obtained judicial interpretation of the Concession Policy and its Agreement with the Authority. Lastly, after the Court declared that the Concession Policy and Agreement required adherence to the competitive process, the Airlines and the Authority agreed via a "Settlement Agreement" voluntarily to comply with the Court's order and judgment requiring that competition be protected.

The conclusion that *no* injury to competition flowed from or could flow from the above alleged conduct is almost too obvious to note. And, as the cases cited in Part A make clear, McCoy's conclusory protestations that the antitrust laws were

violated are not controlling. The Complaint simply fails to allege a cognizable injury to competition. This failing mandated its dismissal.

The Fifth Circuit's determination was in accord with the standards of review and rules of law established by this Court, and the Petition should therefore be denied.

### C. The Amended Complaint Fails To State A Claim Upon Which Relief May Be Granted Because McCoy's Alleged Injury Is Not Causally Connected To The Alleged Violation And Because McCoy Has Not Alleged Any Antitrust Injury

Clayton Act §4, 15 U.S.C. §15, creates a private treble damage action in favor of certain plaintiffs. It provides in pertinent part that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ."

*Id.* McCoy must therefore allege not only a violation of the antitrust laws and an injury to competition in the relevant market, but also that it has suffered some injury to its business or property *by reason of that violation.*

The causation requirement for injunctive relief under §16 of the Clayton Act, 15 U.S.C. §26, although somewhat broader than §4's requirement of an injury to McCoy's business or property, nevertheless requires that McCoy allege a loss or injury cognizable in equity proximately resulting from the alleged antitrust violation.[13]

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[13] *Buckley Towers Condominium, Inc.* v. *Buchwald,* 533 F.2d 934, 938 (5th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977). *See also Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251, 260-62 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130 (1969); *Jeffrey* v. *Southwestern Bell,* 518 F.2d 1129, 1132 (5th Cir. 1975); *Credit Bureau Reports, Inc.* v. *Retail Credit Co.,* 476 F.2d 989 (5th Cir. 1973).

McCoy's allegations fail to satisfy either standard, for three reasons. First, any "injury" allegedly to be suffered by McCoy is the result of *its* contractual commitments to the Authority, contractual commitments that preceded any of the alleged conduct attributed to the Airlines, and not in any way related to such conduct.

McCoy alleges that its injury flows from the fact that it does not have under its current lease a sufficient time period over which to amortize its required capital investment. Amended Complaint, paragraph 27, A-35-36. It is this alleged prospective injury that McCoy sought to avoid by its attempt to obtain the negotiated noncompetitive lease extension.

Since McCoy failed to subvert the competitive process and thereby obtain a noncompetitive lease extension, McCoy would now have the courts impose "causal" responsibility on these Respondents for the capital investment that it unilaterally agreed to assume in its lease with the Authority. Clearly there is no causal connection between any conduct of these Respondents and the alleged capital investments that McCoy may allegedly be required to make.

Second, the only harm allegedly suffered by McCoy is the loss of the present value of the twenty-year lease extension commencing in 1987 (or the "lost profits" from such extension, which amounts to the same thing). McCoy alleges that it suffered this harm because the Airlines "coerced" the Authority to refuse to grant a lease extension. But McCoy shows in its Amended Complaint that the granting of this negotiated extension was prevented by Delta's suit against McCoy and the Authority (Case No. 79-230). A-29-30. McCoy also admits in its Petition (at p. 12) that that lawsuit is *not* the basis for McCoy's antitrust claims (nor could it be, since there are no allegations of sham or baseless litigation and since Delta did in fact prevail on the merits of that litigation). Rather, McCoy contends that the an-

titrust claim arose when the Airlines collectively insisted that the Authority abide by the District Court's decision in Case No. 79-230.

But the lease extension was necessarily rejected pursuant to the ruling of the Court. Even if the other Airlines had joined Delta in enforcing the ruling and compelling the Authority to reject the extension, the *cause* of McCoy's "harm" was Delta's victory in Case No. 79-230, which victory McCoy admits did not violate the antitrust laws. Petition, p.12. Thus, even if McCoy's alleged injury had been caused by actions of the Airlines, it was not caused by anything forbidden by the antitrust laws. The complaint was therefore properly dismissed for failure to allege any antitrust injury, as required by *Brunswick*.

Finally, McCoy's supposed "injury" is the inability to secure an extension in 1979 of a lease that will not expire until 1987, at which time McCoy will be eligible to compete for the concession rights. McCoy alleges no impediment to its ability to bid at that time. Indeed, McCoy will likely have the inside track with respect to such bidding, whenever it takes place, by reason of McCoy's incumbency. The "damages" sought consist of the present value of the lease extension. But if McCoy succeeds in its bidding in 1987, it will realize the very profits whose present value it seeks now. Whether McCoy will suffer any loss at all is entirely speculative at this point, as it must necessarily be until the bidding is concluded in 1987. Since McCoy's own allegations demonstrate that it has not yet suffered any injury in fact, the Amended Complaint is deficient for this reason as well.

### D. McCoy's Allegations Fail To State A Claim Upon Which Relief May Be Granted Because The Alleged Conduct Is Not Prohibited By The Antitrust Laws.

McCoy's Amended Complaint alleged that the Airlines have "joined in an agreement" with the Authority "to fix and establish the conditions under which competitors qualify to seek

entry in the Orlando International Airport consumer service and concession market and to limit the time at which such competitors may seek market entry." A-30-31. It was alleged that the Airlines "have agreed with or coerced [the] Authority to share the scope and effect of the limited discretionary monopoly power granted by the Florida Legislature . . . solely to the Authority." A-34. McCoy also complained that the Airlines have resorted to the District Court to enforce the Agreements and to compel compliance with the Authority's previously-promulgated Concession Policy. A-29-34. Finally, McCoy alleged that the Airlines have directed, controlled, restrained and interfered with the legislative process entrusted by the Florida Legislature to the Authority. A-26-35. Thus, McCoy's Amended Complaint alleges nothing more than joint efforts by the Airlines to influence the decision-making processes of the Authority and resort to the judicial process once efforts at persuasion proved futile. This alleged conduct, if true, would not constitute a violation of the antitrust laws, and consequently the Amended Complaint fails to state a claim for relief.

It is a well-established principle of antitrust law that joint efforts to influence governmental agencies, even if undertaken with the intent to reduce or eliminate competition, are not within the proscription of the federal antitrust laws.[14] See *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (holding that the antitrust laws do not apply to attempts to influence legislative or executive action); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965) (holding that:

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[14] As it did in the District Court and Court of Appeals below, McCoy persists in confusing the so-called "governmental immunity" or "state action" defense with the *Noerr-Pennington* doctrine. Only the latter is at issue in this case. "Governmental immunity" draws its remaining vitality from the ancient doctrine of sovereign immunity, while the *Noerr-Pennington* doctrine derives from the First Amendment principles of freedom of association and the right to petition the

> "Joint efforts to influence public officials do not violate the anti-trust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme violative of the Sherman Act."

*Id.* at 670).

The Authority is an agency of the City of Orlando. It had its genesis in the greater Orlando Port Authority Act of 1957, Chapter 57-1658 of the Laws of Florida, 1957. That Act (hereinafter referred to as the "1957 Act") created the Greater Orlando Port Authority, the direct lineal ancestor of the current Authority. Under Section 3 of the 1957 Act, the Authority was created and constituted as an agency of the City of Orlando. The Florida Legislature specifically provided that:

> "[E]xercise by the Authority of the powers conferred by this Act shall be deemed and held to be an essential municipal function of the City [of Orlando].,"

1957 Act, Section 3.

Section 13(n) of the 1975 Act empowers the Authority:

> "To enter into contracts, leases or other arrangements with federally-certificated air carriers . . . for the use of such projects, under such terms and conditions as it deems appropriate and for such charges, rentals and fees as it deems appropriate. . . ."

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government. *Compare Parker* v. *Brown*, 317 U.S. 341 (1943) *with Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Thus, McCoy's reliance upon *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); and *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978) is simply misplaced. The District Court noted McCoy's misplaced reliance on *California Retail Liquor Dealers* in its order. A-49.

The provisions of the 1957 Act, as amended by the 1975 Act, form an integral part of the Orlando City Code. *See* Chapter 16, Orlando City Code.

The Authority is a governmental agency charged with an important public function: the operation and management of the Airport. The alleged conduct of the Airlines does not by the most liberal reading of the Complaint encompass any activity other than urging the Authority to adopt and enforce Airport Concession Policies, filing suit to compel adherence to the Authority's policies once adopted, and agreement of the parties to settle that litigation by adhering to the principles and requirements set forth by the Court in its order. This type of conduct has been repeatedly held to be protected by the First Amendment and outside the scope of the antitrust laws. See, e.g., *Miracle Mile Associates* v. *City of Rochester,* 617 F.2d 18 (2nd Cir. 1980); *Mark Aero, Inc.* v. *Trans World Airlines, Inc.,* 580 F.2d 288 (8th Cir. 1978); *Taylor Drug Store, Inc.* v. *Associated Dry Goods Corporation,* 560 F.2d 211 (6th Cir. 1977); *Franchise Realty Interstate Corporation* v. *San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977), *Metro Cable Co.* v. *CATV of Rockford, Inc.,* 516 F.2d 220 (7th Cir. 1975); *Security Fire Door Company* v. *County of Los Angeles,* 484 F.2d 1028 (9th Cir. 1973); *Sun Valley Disposal Co., Inc.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969); *Subscription Television, Inc.* v. *Southern California Theater Owner's Association,* 576 F.2d 230 (9th Cir. 1978); *Semke* v. *Enid Automobile Dealers Association,* 456 F.2d 1361 (10th Cir. 1972); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri Illinois Metropolitan District,* 433 F.2d 131 (8th Cir. 1970); *BusTop Shelters, Inc.* v. *Convenience & Safety Corp.,* 521 F.Supp. 989 (S.D.N.Y. 1981); *In re Airport Car Rental Antitrust Litigation,* 521 F.Supp. 568 (N.D.Calif. 1981); *United States* v. *Johns-Manville Corporation,* 259 F.Supp. 440 (E.D.Pa. 1966).

There is no allegation in this case of "sham" or "access-barring" conduct intended to subvert the political and judicial processes that *Noerr-Pennington* was designed to protect. Again, the Amended Complaint alleges only that the Airlines have prevailed upon the Authority, through judicial proceedings and through a settlement agreement terminating that litigation, to adhere to the Concession Policy that the Authority promulgated. Thus, the conduct of the Airlines alleged in the Amended Complaint is not prohibited by the Sherman Act or the Clayton Act, and hence the Amended Complaint fails to state a claim upon which relief may be granted.

## Point III

### The Court Of Appeals Appropriately Affirmed The District Court's Judgment Without A Full Written Opinion.

McCoy's suggestion that the Court of Appeals should be required to write an opinion requires little response. The Court of Appeals did in fact explain the basis for its decision. The Court explicitly stated that its decision was based on the two grounds contained in the District Court's order other than *res judicata*. A-53. The Court essentially adopted the opinion of the District Court (except for the *res judicata* ruling) as its own. McCoy's point is therefore specious.[13]

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[13] McCoy's citation of *Taylor* v. *McKeithen*, 407 U.S. 191 (1972) is misplaced. There the Court of Appeals had summarily *reversed* a district court's ruling with no indication whatsoever of the basis for the reversal. Even the majority acknowledged that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances." *Id.* at 194 (n.4). The Court emphasized that it was only the special circumstances of that case that warranted the vacation and remand therein ordered. *Id.* It is also interesting to note that, on remand, the Fifth Circuit merely explained its decision in some detail and reinstated its original judgment, with no further action by this Court.

## CONCLUSION

The Amended Complaint was properly dismissed. This case involves no conflict among the circuits, nor does it involve any legal issues of broad general significance. The Petitioner merely seeks to have this Court take another look at the application of settled legal principles to the specific complaint involved in this case, an examination already performed by an able district judge and three distinguished circuit judges, who were uniform in their conclusion. For these reasons, the petition for writ of certiorari should be denied.

RICHARD H. SINKFIELD
Counsel of Record for Respondent Airlines

and

PHILLIP S. McKINNEY
Counsel for Respondent Airlines

ROGERS & HARDIN
A Partnership of
Professional Corporations
Thirty-Second Floor
101 Marietta Tower
Atlanta, Georgia 30335
(404) 522-4700

# APPENDIX

## APPENDIX

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## CHAPTER 57-1658
## HOUSE BILL NO. 1123

AN ACT creating the Greater Orlando Port Authority; authorizing said authority to construct, acquire, establish, improve, extend, enlarge, reconstruct, equip, maintain, repair and operate, either within or without or partly within and partly without the territorial boundaries of the City of Orlando, Florida, projects as defined in said act, consisting of harbor, port and shipping facilities of all kinds, airport facilities of all kinds for land and sea planes, exhibition halls and markets, administration buildings, tunnels, causeways and bridges, or any combination of two or more such projects; providing for the transfer to the jurisdiction, control and supervision of the authority of all existing projects owned or controlled by the City of Orlando, Florida; prescribing the powers and duties of the city council of said city and of said authority, authorizing the issuance by said authority of revenue bonds of the City of Orlando, Florida, payable solely from revenues, to pay all or a part of the cost of the acquisition, construction, extension or enlargement of a project or projects; authorizing the issuance of revenue refunding bonds of said city, and the issuance of a single issue of revenue bonds of said city for the combined purpose of (1) paying all or part of the cost of acquiring, constructing, extending or enlarging a project or projects and (2) refunding any revenue bonds or revenue certificates which shall then be outstanding and shall be payable from the revenues of any existing project or projects; providing that no debt of the City of Orlando, Florida, shall be incurred in the exercise of any of the powers granted by this Act; authorizing said authority to fix, regulate and collect rates and charges for the services and facilities furnished by any project under its control, and to pledge the revenue of any such project to the payment of such bonds; providing for the execution of a trust agreement securing the payment of such bonds without mortgaging or encumbering any such project; and exempting all such bonds and such pro-

jects from taxation; authorizing expenditures of funds by city and county for preliminary acts.

*Be It Enacted by the Legislature of the State of Florida:*

Section 1. Short title—This Act shall be known and may be cited as the "Greater Orlando Port Authority Act."

Section 2. Definitions—As used in this Act, the following words and terms shall have the following meanings:

(a) The word "City" shall mean the City of Orlando, a municipal corporation in Orange County, State of Florida.

(b) The Term "City Council" or the word "Council" shall mean the City Council of the City of Orlando or the board or body in which the general legislative powers of the City shall be vested.

(c) The term "Port Authority" or the word "Authority" shall mean the Greater Orlando Port Authority hereinafter created, or if said Authority shall be abolished, the board or commission succeeding to the principal functions thereof or upon whom the powers given by this Act to said Authority shall be given by law.

(d) The word "project" shall mean any one or any combination of two or more of the following: harbor, port and shipping facilities of all kinds, including, but not limited to, harbors, channels, turning basins, anchorage areas, jetties, breakwaters, waterways, canals, locks, tidal basins, wharves, docks, piers, slips, bulkheads, public landings, warehouses, terminals, refrigerating and cold storage plants, terminal railway facilities, rolling stock, car ferries, tugs, boats, conveyors and appliances of all kinds for the handling of passenger traffic; airport facilities of all kinds for land and sea planes, including, but not limited to, landing fields, heliports, hangars, shops, buses, trucks, and all other facilities for the landing, taking off, servicing, repairing and parking of aircraft, and the loading and

unloading and handling of passengers, mail, express and freight; exhibition halls and markets; administration buildings; tunnel, causeways and bridges; and shall include all property, rights, easements and franchises relating to any such project and deemed necessary or convenient for the acquisition, construction or operation thereof.

(e) The word "improvements" shall mean such repairs, replacements, additions, extension, enlargements and betterments of and to a project as are deemed necessary to place such project in proper condition for the safe, efficient and economic operation thereof.

(f) The term "cost" as applied to improvements shall mean the cost of constructing or acquiring improvements as hereinabove defined and shall embrace the cost of all labor and materials, the cost of all machinery and equipment, financing charges, cost of engineering and legal expenses, plans, specifications, and such other expenses as may be necessary or incident to such construction or acquisition.

(g) The term "cost" as applied to a project acquired, constructed, extended or enlarged, shall include the purchase price of any project acquired, the cost of improvements, the cost of such construction, extension or enlargement, the cost of all lands, properties, rights, easements and franchises acquired, the cost of all machinery and equipment, financing charges, cost of investigations and audits and of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such acquisition or construction, administrative expense and such other expenses as may be necessary or incident to the financing herein authorized and to the acquisition or construction of a project and the placing of the same in operation. Any obligation or expense incurred by the City or by the Port Authority prior to the issuance of revenue bonds under the provision of this Act for engineering studies and for estimates of cost and of revenues and for other

technical, financial or legal services in connection with the acquisition or construction of any project, may be regarded as a part of the cost of such project.

Section 3. Greater Orlando port authority—There is hereby created a board or commission to be known as the "Greater Orlando Port Authority", and by that name the Port Authority may sue and be sued, plead and be impleaded, contract and be contracted with, and have an official seal. The Port Authority is hereby constituted an agency of the City, and exercise by the Authority of the powers conferred by this Act shall be deemed and held to be an essential municipal function of the City. The Port Authority shall consist of seven members, including four appointed members, the Mayor of the City of Orlando and a member of the City Council, and a member of the Board of County Commissioners of Orange County elected as hereafter provided. All seven members shall be entitled to an equal voice and vote on all matters of the Authority. The Mayor of the City of Orlando shall be a member of the Authority for the duration of his term of office as Mayor. Two members shall be appointed by the City Council of the City of Orlando, one shall hold office for a term of two years and one shall hold office for a term of four years, the term of each member so appointed to be designated by the Council at the time of his appointment. The remaining two appointed members shall be residents of that portion of Orange County which is outside of the corporate boundaries of said City of Orlando, and shall be appointed by the Board of County Commissioners of Orange County. Of the two members first appointed by the County Commissioners of Orange County, one shall hold office for a term of one year and one shall hold office for a term of three years, the term of each member so appointed to be designated by the Board of County Commissioners at the time of his appointment. In addition to the four appointed members and the Mayor, the City Council and County Commission each shall annually elect one of their members to serve as a member of the Authority for one year or

until their successor is so selected. Each appointed member of the Port Authority shall be a person of outstanding reputation for integrity, responsibility and business ability, but no person who is an officer or employee of said city or of Orange County in any other capacity shall be a member of the Authority except the Mayor and the representatives of the City Council and County Commission as herein provided. Each such appointment of nomination shall be made within thirty days from the effective date of this Act and the term of office of each appointed member shall commence on the date of his appointment and continue until his successor shall be duly appointed.

At least thirty days prior to the date of expiration of the term of any appointed member of the Authority, or within ten days after the creation of any vacancy in the appointed members of the Authority resulting from the death, resignation, change of residence or removal of any such member or from any other cause, the successor or such member shall be appointed. Any member of the Port Authority shall be eligible for reappointment. The successor in each case except the representatives of the City Council and the County Commission shall be appointed and shall hold office for a term of four years from the date of expiration of the term of his predecessor, except that any person appointed to fill a vacancy shall serve only for the unexpired term.

The Port Authority shall elect one of its members as Chairman of the Authority. The Authority shall also elect a Secretary, who may or may not be a member of the Authority. The Chairman and Secretary shall hold such offices at the will of the Authority. The Comptroller in the City of Orlando shall be, ex-officio, the Treasurer of the Authority. Four members of the Authority shall constitute a quorum and the vote of four members shall be necessary for any action taken by the Authority. No vacancy in the Authority shall impair the right of a quorum of the Authority to exercise all of the rights and perform all of the duties of the Authority.

Upon the effective date of his appointment, or as soon thereafter as practicable, each appointed member of the Authority shall enter upon his duties, but before doing so, he shall take an oath to faithfully perform the duties of his office and file the same with the City Clerk of the City of Orlando, and shall execute a bond in the penal sum of Ten Thousand Dollars ($10,000.00) payable to the City of Orlando and conditioned upon the faithful performance of the duties of his office, which bond shall be approved by the City Council and filed with the City Clerk, the cost of the premium on any such bond to be treated as a part of the cost of operation.

The City Council shall fix by ordinance the salary of the appointed members of the Authority, provided that no member of the Authority shall receive a salary in excess of Twelve Hundred Dollars ($1,200.00) per annum, payable in monthly installments for his services as such member. The Chairman of the Authority shall receive such additional compensation for his services as such Chairman as may be fixed by the Authority, with the approval of the City Council. The Secretary shall receive such salary as may be fixed by the Authority with the approval of the City Council, or, in case such officer shall be a member of the Authority, he shall receive such additional salary for his services as such officer as may be fixed by the Authority with the approval of the City Council.

The City Council may remove by a four-fifths vote of the Council any appointed member of the Authority who shall knowingly or willingly neglect to perform any duty required of him by virtue of the provisions of this Act or the Laws of the State of Florida or who shall prove unfit or incompetent to perform such duties; provided however, that before removing any such member the City Council shall hold a hearing, which notice shall contain a statement of the charges against him. Any member so removed may apply to the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, for a review of the action of the Council.

Section 4. Control of existing facilities—No existing projects, as hereinabove defined, and now owned or controlled by the City of Orlando, shall be under the jurisdiction, control or supervision of the Port Authority unless and until the City Council of said City shall so direct by resolution at such time as the said Council shall determine that the Port Authority has been organized and is operating in such a manner as to make control of such projects by the Authority appropriate, desirable and feasible from the standpoint of efficiency of administration, regulation and financing. In the event the City Council shall so direct by resolution, all contracts, books, maps, plans, papers and records of whatever description pertaining to any such project, shall be assigned and transferred to the Port Authority. All revenues of such projects shall thereafter be collected by the Port Authority and shall be applied as provided in this Act, subject to any prior pledges of such revenues.

Section 5. Construction of new projects—It shall be the duty of the Port Authority to make or cause to be made such surveys, investigations, studies, borings, maps, plans, drawings and estimates of costs and of revenues as it may deem necessary, and shall thereafter prepare and adopt a comprehensive plan for the construction, development and improvement of any harbor and shipping facilities of the City of Orlando and for the construction, development and improvement of facilities for handling passengers, mail, express and freight by aircraft. Such comprehensive plan may be extended, modified or changed by the Port Authority from time to time. The Port Authority is hereby authorized and empowered, whenever it shall deem such action feasible and practicable, to acquire, construct, extend or enlarge any project, as hereinabove defined, the cost of such acquisition, construction, extension or enlargement to be paid, in whole or in part, from the proceeds of revenue bonds issued under the provisions of this Act.

* * *

Section 8. Powers of Port Authority—The Port Authority shall have all of the powers which are necessary to carry out the purposes of this Act. Without in any manner limiting or restricting such general powers, the Port Authority shall have power:

(a) To construct, acquire, establish, improve, extend, enlarge, reconstruct, equip, maintain, repair and operate any project, as hereinabove defined, either within or without or partly within and partly without the territorial boundaries of the City.

(b) To issue revenue bonds of the City of Orlando, payable solely from revenues, to pay all or a part of the cost of such acquisition, construction, extension or enlargement.

(c) To fix, regulate and collect rates and charges for the services and facilities furnished by any project under its control, and to pledge the revenues of any such project to the payment of revenue bonds issued under the provisions of this Act.

(d) To make rules and regulations for its own government and procedure, provided, however, that it shall hold a regular meeting at least once a month, and such special meetings as it may deem necessary, and all such meetings shall be open to the public.

(e) To operate, manage and control all projects placed under its control by the provisions of Section 4 of this Act and all projects, as hereinabove defined, hereafter acquired or constructed under the provisions of this Act.

(f) Subject to such provisions and restrictions as may be set forth in the resolution or in the trust agreement hereinafter mentioned authorizing or securing the revenue bonds issued under the provisions of this Act, to acquire in the name of the City, either by purchase or the exercise of the right of eminent domain, within the territorial limits or Orange County, Florida such lands and rights and interests therein, including submerged and partly submerged land, and to acquire such personal property, as it may deem necessary either for the construction of any

project or for the efficient operation or for the extension of any project acquired or constructed under the provisions of this Act, and to hold and dispose of all real and personal property under its control.

(g) To enter into joint arrangements with airlines and air carriers, with stemship lines, railroads, or other transportation lines, or any common carrier, if the Authority shall deem it to the advantage of the City so to do.

(h) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this Act, and to employ consulting engineers, superintendents, managers and such other engineering, construction and accounting experts and attorneys, and such other employees and agents, as may be necessary in its judgment, and to fix their compensation; provided, however, that all such expenses shall be payable solely from the proceeds of revenue bonds issued under the provisions of this Act or from the revenues of the projects under the control of the Authority.

(i) To receive and accept from any Federal Agency grants for or in aid of the construction of any project, and to receive and accept contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made.

(j) To rent and maintain in the City of Orlando an office or offices for the conduct of its business and to rent and maintain such branch offices as it may deem necessary.

(k) Subject to such provisions and restrictions as may be set forth in the resolution or in the trust agreement hereinafter mentioned authorizing or securing the revenue bonds issued under the provisions of this Act, to have exclusive control of the

revenues derived from each project under its control, and of the expenditures thereof.

(l) Subject to the jurisdiction of the United States of America and the State of Florida, to construct, improve or develop airports, heliports, and other air terminals and such buildings, structures, roads, alleyways, railroad loading and unloading facilities and any other development of land as the authority shall determine to be necessary and proper in the performance of the duties and purposes of this Act; and to enact, adopt and establish by resolution, rules and regulations for the complete exercise, jurisdiction and control over such areas.

In connection with and furtherance of the purposes of this Act, the Authority shall have the power to acquire land or other property within the territorial limits of Orange County, Florida by purchase, lease, gift, devise, bequest, exchange or in any other manner, including, but not limited to, proceedings in the name of the City of Orlando, by eminent domain, and the Authority shall have the power to purchase or obtain options, contracts or other rights to acquire land, provided that such options, contracts or other rights shall be for a reasonable period of time and for a nominal consideration.

The Authority shall have the power to sell and dispose of any lands, structures, facilities or other property acquired under this Act, when said Authority shall determine that such lands, structures, facilities or other property is no longer needed for carrying out the purposes of this Act, provided however, that such sale shall be for a fair and reasonable consideration, and the subject matter of any such sale or disposal of property may be subjected by the Authority to reasonable restrictions for the preservation and protection of any other property held or controlled by said Authority. In carrying out the purposes of this Act, the Authority may lease, or rent, any part or portion of land, structure, facility or other property of the Authority to such private persons, corporations, partnerships, or public cor-

poration or agencies or other legal entity, public or private, for use of such property by such lessee as the Authority shall determine is in the best interests of the Authority in furthering the purpose of this Act provided, however, that such lease or other right to use thereof shall be for any term of years not to exceed 20 years.

(m) Subject to the jurisdiction of the United States of America and the State of Florida, to construct, improve and develop any harbor facilities which may be deemed necessary and feasible and all navigable and non-navigable water connected therewith, to regulate and control all such waters, to construct and maintain such canals, slips, turning basins and channels; and upon such terms and conditions as may be required by the United States of America, to enact, adopt and establish by resolution rules and regulations for the complete exercise, jurisdiction and control over all said waters.

(n) To grant licenses to competent and trustworthy persons to act as stevedores in any airport, heliport, terminal, port or harbor under the jurisdiction of the Authority, to conduct examinations for such licenses, and to prescribe the qualifications of such stevedores.

(o) To appoint shipping masters for any Port or Harbor under the jurisdiction of the Authority, to determine their qualifications, and to adopt rules and regulations prescribing their duties.

(p) To prescribe penalties, with the approval of the council, to insure the proper performance of the duties of any such stevedore or of any such shipping master and the enforcement of any rule or regulation which the Authority may adopt and which in its judgment is necessary and conducive to the interests of the airport, heliport, terminal, port of harbor under its jurisdiction, subject to such laws of the United States of America as may be applicable thereto.

(q) To make any and all applications required by the Treasury Department and other departments or agencies of the United States Government as a condition precedent to the establishment within the County of Orange of a free port or area for the receiption from foreign countries of articles of commerce and the handling, processing and delivery thereof into foreigh commerce free from the payment of custom duties and to enter into any agreements required by such departments or agencies in connection therewith and to make like applications and agreements with respect to the establishment within said County of one or more bonded warehouses.

All expenses incurred by the Port Authority in exercising its powers and in performing its functions and duties shall be paid solely from the proceeds of revenue bonds issued under the provisions of this Act or from the revenues of the projects under its control and no liability or obligation not payable from such proceeds or from such revenues shall at any time be incurred in connection with the operation thereof, except as provided in Section 6 hereof.

Section 12. Revenues—The Port Authority shall, in the resolution providing for the issuance of revenue bonds or in the trust agreement securing such bonds, fix the initial rates and charges for the services and facilities furnished by each project affected by such revenue bonds, and shall thereafter from time to time revise such rates and charges, and shall charge and collect the same. Such rates and charges shall be so fixed and adjusted, in respect of the aggregate of rates and charges from all projects affected by such revenue bonds, as to provide funds sufficient to pay (a) the cost of maintaining, repairing and operating such projects, including reserves for such purpose and for replacements and depreciation and necessary extensions, and (b) the principal of and the interest on such revenue bonds as the same shall become due and reserves therefor. Such rates and charges shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the City or

of the State. All revenues derived from any such project or projects, except such part thereof as may be required to pay the cost of maintaining, repairing and operating such project or projects and to provide such reserves therefor as may be provided in the resolution authorizing the issuance of the revenue bonds or in the trust agreement, shall be set aside at such regular intervals as may be provided in such resolution or such trust agreement and deposited for the credit of the following separate funds for the following purposes and in the following order:

(1) For the credit of a sinking fund for the payment of the interest on and the principal of such revenue bonds as the same shall become due and the necessary charges of paying agents for paying such principal and interest, and for the payment of any premium upon bonds retired by call or purchase before their maturity or respective maturities, including the accumulation of a reserve for such purpose;

(2) For the credit of a fund for anticipated extensions, improvements, renewals and replacements, and extraordinary repairs; and

(3) For the credit of a working capital fund.

The use and disposition of moneys to the credit of such sinking fund shall be subject to such regulations as may be provided in the resolution authorizing the issuance of the revenue bonds or in the trust agreement, but except as may otherwise be provided in such resolution or trust agreement, such sinking fund shall be a fund for the benefit of all bonds without distinction or priority of one over another.

At the close of each fiscal year which shall be the same fiscal year as the City of Orlando, the Port Authority shall make a comprehensive report of its operations of each project under its control during the preceding fiscal year, including all matters relating to rates, charges, revenues, expenses of maintenance, repair and operation and of replacements and extensions, prin-

cipal and interest retirements and the status of all funds. Copies of such annual reports shall be filed with the Secretary of the Port Authority, with the City Clerk of the City of Orlando, with the Comptroller of the City of Orlando, with the Clerk of the Board of County Commissioners of Orange County, and, if the revenue bonds shall be secured by a trust agreement, with the Trustee under such trust agreement, and shall be open to the inspection of all interested persons. Any surplus of the gross revenues remaining at the end of any fiscal year after making the required deposits for the credit of the separate funds set forth above, and not appropriated in the budget for the then current fiscal year, shall be paid into the Treasury of the City of Orlando. Not later than one month before the end of each fiscal year the Port Authority shall prepare and submit to the Commission a budget estimate of the expenditures for maintaining, repairing and operating all projects under its control and of the revenues thereof for the ensuing fiscal year. This budget estimate shall be prepared in accordance with the provisions of Chapter 29363, Laws of Florida, 1953 as amended by Chapter 31089, Laws of Florida, 1955, insofar as the same may be applicable. The Commission shall make provision in the annual appropriation ordinance for such expenditures but, subject to the provisions of this Act and of the resolutions authorizing the issuance of revenue bonds or trust agreement securing the same, it may increase or decrease any items set forth in such budget estimate.

* * *

Section 16. Power of eminent domain—It is hereby specifically provided, that, in the acquisition of any land or other property by the exercise of the power of eminent domain and condemnation proceedings as herein provided, the Authority shall first authorize and provide for such acquisition and condemnation by appropriate resolution of the Authority, which shall be presented to the City Council for its approval and action as

hereinafter provided. No condemnation proceedings in exercise of the power of eminent domain shall be initiated or valid, unless and until the City Council shall, by ordinance, approve the resolution of the Authority and authorize by ordinance the exercise of the power of eminent domain in the name of the City of Orlando for the purposes set forth in such resolution of the Authority. All such condemnation proceedings shall then proceed in the manner provided by law for the exercise of the power of eminent domain by a municipality for the acquisition of property for a proper municipal and public purpose.

* * *

Section 19. This Act shall take effect upon the passage and approval of this Act by the Governor or upon its becoming a law without such approval.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 30, 1957.

* * *

## CHAPTER 75-464

House Bill No. 2168

AN ACT relating to the Greater Orlando Port Authority, Orange County; supplementing and amending the provisions of chapter 57-1658, Laws of Florida, as amended by chapter 61-2599, Laws of Florida, as further amended by chapter 67-1834, Laws of Florida, as further amended by chapter 69-1389, Laws of Florida, known as "The Greater Orlando Port Authority Act," changing the short title to "The Greater Orlando Aviation Authority Act"; defining the projects which the authority is empowered to carry out; defining the terms "improvements" and "cost" as used in the act; prescribing the nomination, election, removal, qualifications, and terms of members of the authority; defining the purposes of the authority; prescribing the powers of the authority; prescribing the appointment and duties of the executive director of the authority; prescribing the terms and conditions under which the authority may purchase, sell, lease, and dispose of real and personal property; authorizing the authority to enter into agreements with other governmental agencies; authorizing the authority, with prior approval of the Orlando City Council, to constitute its own law enforcement and/or fire protection agencies and services; prescribing the terms and conditions under which the authority may issue revenue bonds; prohibiting the authority from pledging the taxing power or full faith and credit of the City of Orlando; prescribing the method and procedure for the authority to adopt its annual budget; authorizing the authority to exercise the power of eminent domain; authorizing the City of Orlando to enforce its ordinances of general application other than zoning upon projects of the authority; authorizing the authority to adopt rules and regulations for the operation and use of its projects, services, and facilities; authorizing other public bodies to contract with the authority; providing that the powers conferred by the act shall be cumulative to general or

special law; prescribing a covenant of the State of Florida not to further amend the act without prior consent of the Orlando City Council so long as airport revenue bonds of the City of Orlando are outstanding; providing that the authority shall have the powers conferred by general law upon a municipality with respect to the construction, acquisition, and operation of airport and aviation facilities; prohibiting conflicts of interest; providing an effective date.

*Be It Enacted by the Legislature of the State of Florida:*

*Section 1.* That Section 1 of Chapter 57-1658, Laws of Florida, be amended to read as follows:

"*Section 1.* Short Title.

This act shall be known and may be cited as the 'Greater Orlando Aviation Authority.' "

*Section 2.* That subsection (c) of Section 2 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(c) The term 'aviation authority' or the word 'authority' shall mean the Greater Orlando Aviation Authority hereinafter created, or if said authority shall be abolished, the board or commission succeeding to the principal functions thereof or upon whom the powers given by this act to said authority shall be given by law."

*Section 3.* That subsection (d) of Section 2 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(d) The word 'project' shall mean any one or more, or any combination of two or more of the following, or planning for the same:

(1) any are of land or water, or easement or other interest therein, which is used or intended for use for the take-off,

landing, taxiing, parking or storing of aircraft, or for the transportation by air of persons and things, or for the location of any and all buildings, structures, appurtenances, machinery, equipment, and all other types of property and facilities related thereto, such as, but not limited to, landing fields, heliports, runways, taxiways, hangars, aircraft parking aprons, shops, offices, aircraft and air passenger terminal buildings and structures;

(2) areas of land or water, and easements above, on, or under the surface thereof, used or intended for use for over-flight, for noise abatement or noise buffers, for clear zones, or for side transition zones;

(3) other structures, improvements, and buildings of all types used or useful for the convenience of the public or for commercial or general aviation activities, located on the property of the authority, such as, but not limited to, restaurants, hotels, motels, exhibition halls, convention facilities, automotive parking facilities, retail stores, aircraft fueling systems, automotive service centers, cargo buildings, warehouses, industrial developments, kitchen facilities, drainage systems, utilities systems, roadways, automobile and aircraft bridges, and surface transportation terminals and facilities;

(4) beacons, markers, communications systems, and all navigation facilities for use in aid of air navigation;

(5) any and all other improvements or facilities which, in the judgment of the authority are necessary, useful or desirable to serve the occupants, passengers, users, employees, operators, airlines, or lessees of any portion of the property or facilities of the authority, or which are otherwise deemed by the authority to be in the public interest, including, but not limited to, such facilities as may be necessary, used, useful, or intended for use: for the handling, parking, storing, display, sale or servicing of aircraft, either private or commercial; for the accommodation

of persons and the handling of freight, mail, and other items transported by air; for the furnishing and supplying of goods, commodities, services, things and facilities that are deemed by the authority to be appropriate for the safety or convenience of the traveling public or of the operators of aircraft, or otherwise in the public interest; and in or for the equipping, operation, and maintenance of any of the projects of the authority."

*Secton 4.* That subsection (e) of Section 2 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(e) The word 'improvements' shall mean any repairs, replacements, additions, extensions, enlargements or betterments of and to a project as the authority deems necessary to place or to maintain such project in proper condition for the safe, efficient and economic operation thereof."

*Section 5.* That subsection (g) of Section 2 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(g) The term 'cost' as applied to a project acquired, constructed, extended or enlarged, shall include the purchase price of any project acquired, the cost of improvements, the cost of such construction, extension or enlargement, the cost of all lands, properties, rights, easements and franchises acquired, the cost of all machinery and equipment, financing charges, cost of investigations and audits and of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such acquisition or construction, administrative expense and such other expenses as may be necessary or incident to the financing herein authorized and to the acquisition or construction of a project and the placing of the same in operation. Any obligation or expense incurred by the city or by the authority prior to the conveyance of a project by the city to the authority under this act, or prior to the is-

suance of revenue bonds under the provisions of this act, for engineering studies and for estimates of cost and of revenues and for other technical, financial or legal services in connection with the acquisition or construction of any project, may be regarded as a part of the cost of such project."

*Section 6.* That Section 3 of Chapter 57-1658, Laws of Florida, as amended by Chapter 57-1834, Laws of Florida, be amended to read as follows:

"Section 3. Greater Orlando Aviation Authority.

There is hereby created a board or commission to be known as the 'Greater Orlando Aviation Authority,' and by that name the authority may sue and be sued, plead and be impleaded, contract and be contracted with, and have an official seal. The authority is hereby constituted an agency of the city, and exercise by the authority of the powers conferred by this act shall be deemed and held to be an essential municipal function of the city. The authority shall consist of nine (9) members who shall be nominated and elected as follows: Six appointed members, all of whom shall be residents of Orange County, Florida, and two (2) of whom shall be residents and electors of the City of Orlando; two (2) members of the city council, who may be the mayor-commissioner and one other commissioner or two commissioners; and an incumbent member of the board of county commissioners of Orange County, Florida. The appointed members and city council members shall be nominated by the mayor-commissioner or any other commissioner, and elected by the city council. The member from the board of county commissioners of Orange County shall be elected by a majority vote of such commisison. All nine members shall be entitled to an equal voice and vote on all matters relating to the authority and its business. Three of the six appointed members first elected by the city council shall be elected for a term of two years and three shall be elected for a term of four years, the term of each member so elected to be designated by city council at the time of

his election. The two members of the city council and the member of the county commission shall be elected for a term of two years each; provided, however, that any such commissioner's term shall end at such time as he may cease to be a city or county commissioner, at which time a successor or successors shall be elected for any unexpired term. The terms of such commissioner members, which shall not exceed two years, shall be designated by the city council at the time the first appointments are made, and shall thereafter be for a biennial period. The terms of all appointed members shall end at the expiration of their terms of appointment, or as otherwise herein specified.

Each appointed member of the authority shall be a person of integrity, responsibility and business ability. It is desirable, but not essential that one or more appointed members be experienced in some aviation-related field. Any person then employed by the City of Orlando or by the County of Orange shall not be elected, and shall not serve as an appointed member of the authority. The initial appointment and election of members hereunder shall be accomplished at such time as the city council determines.

At least thirty days prior to the date of expiration of the term of any appointed member of the authority, or within thirty days after the creation of any vacancy in the appointed or other members of the authority resulting from the death, resignation, change of residence or removal of any such member or from any other cause, the successor of such member shall be elected. Any member of the authority shall be eligible for reappointment; provided, that no member shall serve more than two consecutive terms or eight consecutive years, whichever is the greater. Subject to the foregoing provisions, the successor in each case, except the representatives of the city council and the representative of the board of county commissioners, shall be elected and shall hold office for a term of four years from the date of expiration of the term of his predecessor, except that

any person elected to fill a vacancy shall serve only for the unexpired term.

The authority shall elect one of its members as its chairman. The chairman shall be elected for a term of two (2) years. If the elected chairman shall cease to be a member of the authority, or shall for any reason not serve as chairman, a successor shall be elected for the unexpired portion of his term. No person shall serve more than two consecutive terms as chairman or four consecutive years, whichever is greater. The authority may also elect a secretary, who may or may not be a member of the authority. The secretary shall hold office at the will of the authority. The director of finance of the City of Orlando, or any other person elected by the authority and approved by the city council, shall be the treasurer of the authority. Six (6) members of the authority shall constitute a quorum and the vote of five members shall be necessary for any action taken by the authority. No vacancy in the authority shall impair the right of a quorum of the authority to exercise all of the rights and perform all of the duties of the authority.

Upon the effective date of his appointment, or as soon thereafter as practicable, each appointed member of the authority shall enter upon his duties, but before doing so, he shall take an oath to faithfully perform the duties of his office and file the same with the city clerk of the City of Orlando, and shall execute a bond in the penal sum of ten thousand dollars ($10,000.00) payable to the City of Orlando and conditioned upon the faithful performance of the duties of his office, which bond shall be approved by the city council and filed with the city clerk, the cost of the premium on any such bonds to be treated as part of the cost of operation.

The members of the authority shall serve without compensation; provided, that they shall be reimbursed by the authority for their reasonable out of pocket, travel, and per diem expenses incurred in attending meetings of or on behalf of the

authority, or otherwise in engaging in the business of the authority. The secretary shall receive such salary as may be fixed by the authority, or, in case such officer shall be a member of the authority, he shall receive such salary for his services as such officer as may be fixed by the authority with the approval of the city council.

Any appointed member may be removed from office by majority vote of the members of the city council for good cause affecting his ability to perform his duties as a member, for misfeasance, malfeasance or nonfeasance in office, or for violating the conflicts of interests provisions of this act, but only after a hearing at which such member is given the right to present evidence in his own behalf and only upon a finding by majority vote of the members of the city council that good cause for removal affecting the member's ability to perform his duties as a member exists, that he was guilty of misfeasance, malfeasance or nonfeasance in office, or that he violated the conflicts of interests provisions of this act.

Notwithstanding anything else herein provided, any member of the authority shall serve until his successor shall have been elected and taken office, except in the case of an appointed member who has been removed during his term by action of the city council."

*Section 7.* That Section 5 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"Section 5. Construction of new projects.

It shall be the duty of the authority to make or cause to be made such surveys, investigations, studies, borings, maps, plans, drawings and estimates of costs, traffic, and revenues as it may deem necessary, and shall thereafter prepare and adopt a comprehensive plan for the construction, development and im-

provement of any and all projects of the authority, and for the construction, development and improvement of facilities within Orange County, Florida, for handling air passengers, mail, express and freight, and for handling general aviation and commercial aircraft. Such comprehensive plan may be extended, modified or changed by the authority from time to time. The authority is hereby authorized and empowered, whenever it shall deem such action feasible and practicable, to acquire, construct, extend or enlarge any project, as hereinabove defined. The cost of any such surveys, investigations, plans, and estimates, and of any such acquisition, construction, extension or enlargement shall be paid, in whole or in part, from the proceeds of revenue bonds issued under the provisions of this act, from revenues of projects of the authority, or from any other funds legally available for such purposes."

*Section 8.* That the introductory paragraph of Section 8 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"Section 8. Purposes; powers of authority.

The purposes of this act are to create an aviation authority in Orange County, Florida, and through it to provide a means to serve the public interest through the coordination of the planning, financing, construction, and operation of aviation facilities of the authority to the end that: adequate public air navigation and transportation facilities are provided; that safe and efficient air commerce is promoted; that aviation projects of the authority are correlated with aviation projects operated by others within this region, this state, and this nation; that orderly and proper use and development of public airports within Orange County will occur as required to develop the potential of orange county as an air trade center and to support and enhance economic development therein, and that projects of the authority will be included in national and international programs for air transportation relating to general aviation and commercial air

transport of passengers and cargo. The authority shall have all of the powers which are necessary to carry out the purposes of this act. Without in any manner limiting or restricting such general powers, the authority shall have power:"

*Section 9.* That subsection (f) of Section 8 of Chapter 57-1658, laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(f) To acquire in the name of the authority, either by purchase or the exercise of the right of eminent domain within the territorial limits of Orange County, Florida, such lands, including submerged and partly submerged land, in fee simple or any lesser interest or easement, and improvements thereto, and to acquire such personal property, as it may deem necessary either for the construction of any project or for the efficient operation or for the extension of any project acquired or constructed or to be constructed under the provisions of this act, including the elimination of airport hazards, and to hold, lease, and dispose of all land and personal property under its control; provided that any real estate or interset therein proposed to be purchased, acquired, or sold by the authority shall first be approved by resolution of the city council; and further provided that the granting of any lease or franchise for a term in excess of ten (10) years shall first be approved by resolution of the city council."

*Section 10.* That subsection (g) of Section 8 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(g) To appoint, fix the compensation of, and make provision for the discharge of an Executive Director who, under the supervision of the authority, shall be responsible for the operation, management and promotion of all activities with which the authority is charged under this act, together with such other duties as may be prescribed by the authority, and he shall have

such powers as are incident to the performance of his duties and such others as may be prescribed by the authority. The authority may also employ such other officers, agents, and employees under such terms and conditions as it shall consider necessary and appropriate to effectuate its purposes under this act; provided, that the authority shall, except in unusual circumstances where clear justification exists, compensate its officers, agents, and employees at rates not in excess of those paid by the City of Orlando to its employees engaged in similar duties."

Section 11. That subsections (h) and (i) of Section 8 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(h) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ consulting engineers, architects, superintendents, managers, aviation consultants, accountants, and attorneys, and such other consultants and advisors as may be necessary in its judgment to accomplish the purposes of this act, and to fix their compensation; provided, however, that all such expenses shall be paid solely from the proceeds of revenue bonds issued under the provisons of this act, or from revenues of projects of the authority, or from any other funds legally available for such purposes.

"(i) To make application directly or indirectly to any federal, state, county or municipal government or agency or to any other source, public or private, for loans, grants, guarantees or other financial assistance in aid of projects of the authority, and to accpet and use the same upon such terms and conditions as are prescribed by the federal, state, county or municipal government or agency or other source."

*Section 12.* That subsection (j) of Section 8 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(j) To enter into agreements with the state, any subdivision or department thereof, or any county or municipality or the federal government or any agency thereof to use the facilities or the services of the state or such subdivision or department, or such county or municipality or the federal government or any agency thereof, as necessary or desirable to accomplish the purposes of this act; or to allow any of such agencies to utilize the facilities or the services of the authority as necessary or desirable to accomplish the purposes of this act."

*Section 13.* That subsections (l), (m), (n), (o), and (p) of Section 8 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(l) To adopt and enforce in the courts of this state reasonable rules and regulations for the orderly, safe, efficient, and sanitary operation and use of projects and facilities owned by it or under its control; provided, that no such rule or regulation shall be adopted which, in the judgment of the authority, will directly affect the traveling public as a class, except subsequent to a public hearing which shall be advertised twice in a newspaper of general circulation in Orange County, Florida, the first such publication to occur not more than fourteen days, and the second such publication to occur not less than four days prior to the proposed adoption thereof.

"(m) Subject to the provisions of Section 8(f) of this act to enter into exclusive or non-exclusive contracts, leases, franchises, or other arrangements with any person or persons for terms not exceeding fifty (50) years granting the privilege of using or improving any project of the authority or any portion thereof or space therein for commercial purposes, conferring the privilege of supplying goods, commodities, things, services or facilities at such project or projects; or making available services to be furnished by the authority or its agents at such project; and to establish the terms and conditions and fix the charges, rentals,

or fees for such privileges or services so long as such fee or charges shall not conflict with any applicable rules and regulations of the Public Service Commission.

"(n) To enter into contracts, leases or other agreements with federally certificated air carriers, other commercial air carriers and other commercial users of its projects, for the use of such projects, under such terms and conditions as it deems appropriate and for such charges, rentals and fees as it deems appropriate; and to enter into any contracts, leases or other agreements, set any tolls, fees, or other charges for the use of its property or services, and collect and use same as necessary to operate the projects under its control and to accomplish any purposes of this act.

"(o) To contract with any persons, firms, or public or private corporations to supply goods, commodities, facilities, and services to the public, employees of the authority and employees of air carriers and other commercial interests located at any project under its control under such terms and conditions as it deems appropriate.

"(p) Subject to the provisions of Section 8(f) of this act, to acquire land or other real or personal property within the territorial limits of Orange County, Florida, by purchase, lease, gift, devise, bequest, exchange or in any other manner, including, but not limited to, proceedings in the name of the authority, by eminent domain; and the authority shall have the power to purchase or obtain options, contracts or other rights to acquire land or other real or personal property, provided that such options, contracts or other rights shall be for a reasonable period of time and for a consideration not in excess of five percent (5%) of the purchase price specified upon the exercise of such options, contracts, or other rights, unless prior approval of the city council shall have been obtained.

Subject to the provisions of Section 8(f) of this act, the authority shall have the power to sell and dispose of any lands,

structures, facilities or other property acquired under this act, when it shall determine that such lands, structures, facilities or other property are no longer needed for carrying out the purposes of this act; provided, however, that such sale shall be for a fair and reasonable consideration; and further provided that the authority, with the prior approval of the city council, may sell, or give the right of use of its property to the city or other public body without consideration or for less than a full and adquate consideration; and the subject matter of any such sale or disposal of property may be subjected by the authority to reasonable restrictions for the preservation and protection of any other property held or controlled by said authority. In carrying out the purposes of this act, the authority may lease or rent any part or portion of land, structure or facility of the authority to each private persons, corporations, partnerships, or public corporations or agencies or other legal entity, public or private, for use of such property by such lessee as the authority shall determine is in the best interests of the public in furthering the purposes of this act; provided, however, that such lease or other right to use thereof shall be for any term of years not to exceed fifty (50) years."

*Section 14.* That subsection (q) of Section 8 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"(a) To make any and all applications required by the Treasury Department and other departments or agencies of the United States government or of this state as a condition precedent to the establishment within the County of Orange of a free port or area for the reception from foreign countries of articles of commerce and the handling, processing and delivery thereof into foreign commerce free from the payment of custom duties, and to enter into any agreements required by such departments or agencies in connection therewith and to make like applications and agreements with respect to the establishment within said county of one or more bonded warehouses."

*Section 15.* That Section 8 of Chapter 57-1658, Laws of Florida, as amended by Chapter 67-1834, Laws of Florida, be amended by the addition of subparagraphs (r), (s), (t), (u), and (v), as follows:

"(r) With the express prior approval by ordinance of the city council,

(1) To employ and constitute its own airport guards or police officers, or to contract with the city or any other agency of the state or Orange County to provide law enforcement services and protection through its duly sworn officers, and all such officers shall have full power of arrest to prevent or abate the commission of any offense against the ordinances of the city, the laws of this state, or the laws of the United States, when any such offense, or threatened offense occurs upon any lands or project owned by or under the control of the authority;

(2) To provide its own fire protection, crash and rescue services or to arrange for such services with any federal, state, municipal or county agency or any private firm in the business of providing such services.

"(s) To acquire by agreement, and not through the exercise of eminent domain, any aviation projects of the city, or, with the prior approval of the city council, any other aviation projects situate within Orange County, whether publicly or privately owned; provided, that upon conveyance of any such aviation project to the authority, all contracts, commitments, leases and any other obligations then outstanding with respect to such aviation project shall be transferred to and assumed by the authority. The Board of County Commissioners of Orange County, and any municipality or other public body of the state having an interest in an aviation project situate in Orange County are hereby authorized to convey their interests in any such aviation project to the authority, upon terms and conditions acceptable to such public body and to the authority.

"(t) To enter into agreements with the city, or with any other public body owning or operating aviation projects of which the authority may subsequently assume control, with respect to the manner of transfer of persons employed by the city or other public body at such aviation projects to the authority, as the authority deems necessary and appropriate.

"(u) To establish a plan for retirement, disability, hospitalization, and other fringe benefits, and for death benefits for officers and employees of the authority, provided that such plan shall not, except in extraordinary cases where clear justification exists, provide benefits in excess of those provided under the plan or plans of the City of Orlando for its employees in comparable positions, or to provide by resolution that such officers and employees shall be covered under any plan of the city, Orange County, or the state available to them under the laws of the city, Orange County, or the state.

"(v) To exercise each and every power not inconsistent with express provisions of this act which any municipality of this state may now or hereafter exercise with respect to the operation, acquisition, construction, or financing of airports or airport projects owned or controlled by such a municipality under the provisions of the general laws of this state."

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*Section 18.* That Section 12 of Chapter 57-1658, Laws of Flordia, as amended by Chapter 67-1834, Laws of Florida, be amended to read as follows:

"Section 12. Revenues and Budgeting Thereof.

Not less than one month prior to the end of each fiscal year of the authority, which shall be the same fiscal year as that of the city, the authority shall adopt by resolution its proposed budget for the ensuing fiscal year, and submit the same to the city council. Such proposed budget shall include all anticipated expen-

ditures of the authority for all of its projects during the ensuing fiscal year, including operating expenses, capital outlays, materials, labor, equipment, supplies, payments of principal and interest on all outstanding revenue bonds of the authority, and sinking fund and reserve requirements of such bonds. Such proposed budget shall provide for expenditures only to the extent of funds legally available to the authority for such purposes and reasonably anticipated revenues of the authority for the ensuing fiscal year from established sources, based upon past experience and reasonable projections thereof, and from new projects or new sources of income of the authority. The city council shall, within ten (10) days of its receipt of such proposed budget, conduct a public hearing with respect thereto, and in that event, the chairman and executive director of the authority shall be present at such public hearing. During the last ten (10) days of each fiscal year, the authority shall adopt by resolution its budget for the ensuing year, subject to the same constraints as to the amount of expenditures as set forth above with respect to the proposed budget of the authority. Once adopted, the said budget shall not be amended except by resolution of the authority and except following: the giving of ten (10) days' written notice of the proposed amendment to the city council; and the giving of public notice of the authority's intention to consider amending its budget, which notice shall be by publication in a newspaper of general circulation in Orange County at least ten (10) days prior to the meeting of the authority at which such proposed amendment is to be finally considered.

Within ninety (90) days following the close of each fiscal year, the authority shall make a comprehensive report of its operations of each project under its control during the preceding fiscal year, including all matters relating to rates, charges, revenues, expenses of maintenance, repair and operation and of replacements and extensions, principal and interest retirements and the status of all funds. Copies of such annual reports shall be filed with the secretary of the authority, with the

city council, with the board of county commissioners of Orange County, and, if the revenue bonds shall be secured by a trust agreement, with the trustee under such trust agreement, and shall be open to the inspection of all interested persons.

The authority shall cause an audit to be made of its books and accounts for each of its fiscal years by an independent certified public accountant, which audit shall be accompanied by the accountant's opinion and qualifications relating thereto, if any."

*Section 19.* That Section 16 of Chapter 57-1658, Laws of Florida, be amended to read as follows:

"Section 16. Power of Eminent Domain. It is hereby specifically provided, that, in the acquisition of any land or other property by the exercise of the power of eminent domain and condemnation proceedings as herein provided, the authority shall first authorize and provide for such acquisition and condemnation by appropriate resolution of the authority, which shall be presented to the city council for its approval and action as hereinafter provided. No condemnation proceedings in exercise of the power of eminent domain shall be initiated or valid, unless and until the city council shall, by resolution, approve the resolution of the authority and authorize by resolution the exercise of the power of eminent domain in the name of authority for the purposes set forth in such resolution of the authority. All such condemnation proceedings shall then proceed in the manner provided by law for the exercise of the power of eminent domain by a municipality for the acquisition of property for a proper municipal and public purpose."

* * *

*Section 24.* This act shall take effect upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 27, 1975.

# Opposition

# 2

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NO. 81-888

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

McCOY RESTAURANTS, INC.,
Petitioner,
vs.

GREATER ORLANDO AVIATION AUTHORITY, DELTA AIRLINES, INC., EASTERN AIRLINES, INC., REPUBLIC AIRLINES, INC., NATIONAL AIRLINES, INC., and PAN AMERICAN WORLD AIRWAYS, INC., as Successor in Interest to NATIONAL AIRLINES, INC.,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (NOW THE ELEVENTH CIRCUIT)

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# BRIEF OF RESPONDENT GREATER ORLANDO AVIATION AUTHORITY IN OPPOSITION

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VAN DEN BERG, GAY & BURKE, P.A.
16 South Magnolia Avenue
Post Office Box 2193
Orlando, Florida 32802
305/423-7656

Norman F. Burke
Counsel of Record for
Respondent Authority
and
Jon M. Wilson
Counsel for
Respondent Authority

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an antitrust complaint which alleges a conspiracy between airlines and an airport authority states a claim for relief under Rule 12, when it fails to allege any injury to competition and fails to allege any injury to the plaintiff's business by reason of the violation.

2. Whether an antitrust complaint may be dismissed on grounds of "State Action", when it alleges that airlines entered into written agreements with the airport authority to require competition for airport concessions.

3. Whether it is appropriate for a federal appellate court to decide an appeal without an opinion when there clearly is no conflict on questions of

law between the trial court judgment and decisions of the Supreme Court or other federal courts of appeals.

## STATEMENT OF THE CASE

Petitioner ("McCoy") operates a food and beverage concession at the Orlando International Airport, pursuant to a concession lease with respondent Greater Orlando Aviation Authority ("Authority" or "GOAA"). The lease is scheduled to expire in April 1987. This lease, executed in 1967 and renewed in 1977, grants McCoy the exclusive privilege to operate all food and beverage concessions in the terminal facilities then existing or to be built during the term of the lease and to operate on-field catering services for in-flight food and beverages to be served to airline passengers and crew members. (A. 28, ¶9).*

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*References to pages of the Petitioner's Appendix are abbreviated as (A. ___).

The Authority is a municipal body of the City of Orlando, Florida, created pursuant to the Laws of Florida of 1957, Ch. 57-1658. The Authority is granted the express power to construct and improve airport facilities and to enter into contracts, leases and other arrangements with air carriers as become necessary to effectuate airport projects. (A. 25-27).

Pursuant to these powers, the Authority, in February 1978, adopted the "Orlando International Airport, Orlando, Florida, Policy for Awarding Concession and Consumer Service Privileges in the New Terminal Complex" (hereinafter referred to as the "Concession Policy"). The policy is referred to but is not quoted in McCoy's Amended Complaint. (A. 28, ¶10).

The Concession Policy provides three ways by which airport concession privileges may be awarded:

(1) Competitive bidding to specifications.

(2) Competitive proposals, based upon specifications, followed by negotiations with the selected proposers to obtain maximum revenue consistent with desired levels of public service.

(3) Negotiation with a single concessionaire where services or products are unique or where they are of a sole source in accord with state law or regulation.

Also, pursuant to its express powers, the Authority entered into written agreements (hereinafter referred to as "Airlines Lease and Use Agreements") with respondents Delta,

Eastern, National and Republic Airlines, each of which contained the following provision:

> "6.04 Concession Policy.
>
> "Authority...agrees that it will ordinarily take competitive bids for nonaeronautical concessions in Airport System exceeding one year and award such concession contract to the qualified, responsible bidder whose proposal shall be in the best interest of the Authority. It is agreed that if for prudent operating reasons and in accordance with Authority's Concession Policy it is desirable to depart from this procedure, any such departure shall be in accordance with the provisions of the legislative act creating the Authority and the laws of Florida after advertised public hearing." (A. 29, ¶13).

During 1979 to 1981, the Authority was engaged in the construction of new terminal facilities at the airport, which opened in October 1981. A special act of the Florida legislature required the Authority to plan for and build

these new facilities pursuant to a comprehensive plan. The Airlines are obligated by the Airlines Lease and Use Agreements to share the debt service obligation of the public bonds which were issued to finance the construction of the new airport facility. The revenues from various concessions in the facility are to be applied against these debt service charges. (A. 31, ¶18).

McCoy alleges that the Authority was prepared to extend McCoy's lease agreement beyond the current 1987 expiration, and that such an extention (20 years, to the year 2007) would have enabled McCoy to better amortize its capital investment necessary to build its food and beverage complex in the new terminal. (A. 32-35).

In May 1979, Delta filed suit in the United States District Court for the Middle District of Florida, Orlando Division, Case No. 79-230-ORL-CIV-Y (hereinafter referred to as "Case No. 79-230") against the Authority seeking a declaratory judgment concerning judicial construction of the "Concession Policy" provisions contained within the Airlines' Lease and Use Agreements. McCoy intervened as a defendant in that action. The District Court interpreted these provisions as requiring the Authority to adhere to its Concession Policy during the term of the Airlines' Lease and Use Agreements unless the Airlines approved a change in this procedure. (A. 29-30).

Subsequent to this declaratory judgment, McCoy attempted to induce the

Authority to place the concession rights up for bidding immediately, more than seven years prior to the termination of its lease. Delta filed a motion to enjoin this effort. The District Court granted Delta's motion and ordered that competitive proposals could be solicited by the Authority only within a reasonable time prior to the April 1987 expiration date of McCoy's lease. (A. 46).

After the judgment in Case No. 79-230 was issued, the Airlines and the Authority entered into a "Settlement Agreement" memorializing their intention to voluntarily comply with the District Court's order that competitive bidding be protected. (A. 33, ¶21). The Settlement Agreement provides in part:

> "4. GOAA shall amend its Concession Policy referred to in the Agreement so as to provide

> that nothing in said Policy shall preclude a corporation, firm or individual authorized to do business, in the State of Florida from submitting a bid or a proposal for the award of contracts or concessions at the Orlando International Airport; provided, however, that GOAA shall adopt such reasonable eligibility requirements as are necessary to insure that the parties allowed to bid are likely to have the capability of providing the desired goods and services. The parties agree to cooperate in drafting revisions to the Concession Policy to accomplish this purpose. Except as provided herein, and except as it may be modified by subsequent written agreement between the parties, the Concession Policy is reaffirmed as incorporated within the Agreement at Paragraph 6.04 and shall remain in full force and effect. The Signatory Airlines shall, however, consider in good faith all subsequent proposals by GOAA to amend the Concession Policy and shall not unreasonably withhold their consent thereto."

McCoy contends that this Settlement Agreement is a combination between Airlines and the Authority to control the concession market and to restrain trade

at the airport, in contravention of the Authority's business judgment. (A. 30, ¶15).

McCoy filed the instant suit based upon its alleged loss of the "present value" of a lease extension which it claims it would have received absent the intervention of the Airlines and absent the District Court declaratory ruling imposing competitive conditions on the bidding procedure. (A. 29-30). It is evident, therefore, that the primary allegation of the Amended Complaint is that the Airlines and the Authority engaged in "anticompetitive" acts in that they conspired to deprive McCoy of the twenty-year extension it would have negotiated with the Authority.

The District Court for the Middle District of Florida dismissed McCoy's

Amended Complaint, pursuant to a Rule 12(b)(6) motion, and held that the Complaint failed to allege injury to competition and failed to exhibit any injury to McCoy which had resulted from the alleged anticompetitive conduct. In addition, it was held that an application of the Noerr-Pennington doctrine required a finding that the joint efforts of the Airlines to enforce the official Concession Policy of the Authority were not prohibited by the Sherman Act.*

The Fifth Circuit affirmed the District Court judgment without an opinion. The basis for this affirmance

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*Additional grounds of res judicata and collateral estoppel also formed the basis of the District Court's ruling. These grounds were not relied upon by the Fifth Circuit in affirming the District Court opinion. The full text of the District Court opinion appears in the Appendix at pages 44-49.

was set forth in the Fifth Circuit's denial of McCoy's Petition for Rehearing:

> "On April 22, 1981, we affirmed the district court's decision without writing an opinion. The district court had based its decision on three grounds, res judicata and related concepts, state action exemption, and failure to state a claim under the federal antitrust laws....
>
> "To remove any possibility of misunderstanding about the effect of our decision rendered without opinion in this case, we point out that the affirmance was not based on the ground of res judicata, but on the other two grounds contained in the district court's order." (A. 53).

McCoy thereupon filed this petition for a writ of certiorari.

## ARGUMENT

### Point I

THE FIFTH CIRCUIT'S AFFIRMANCE OF THE DISMISSAL OF PETITIONER'S CLAIM IS IN STRICT ACCORDANCE WITH DECISIONS OF THIS COURT CONCERNING THE ALLEGATIONS NECESSARY TO STATE A CLAIM UNDER THE FEDERAL ANTITRUST LAWS.

The first basis of McCoy's petition for a writ of certiorari is the contention that a conflict exists between the Fifth Circuit's decision and this Court's opinion in Radovich v. National Football League, 352 U.S. 445 (1957). In Radovich an antitrust complaint was dismissed for failure to state a claim upon which relief could be granted. The Court held that:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' ... and meet the requirement that

> petitioner has thereby suffered injury." 352 U.S. at 453.

Since Radovich, this Court has rendered opinions in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), Brown Shoe Co. v. United States, 370 U.S. 94 (1962), Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 447 (1977), all of which review the necessary elements of an antitrust complaint.

In Radiant Burners, the Court required the complaint to allege both a violation in the nature of anticompetitive behavior and damages which were incurred as a result of that behavior. Brown Shoe and Brunswick Corp. held that the antitrust laws were enacted for "the protection of competition, not competitors."

Thus, the showing of an anticompetitive effect is a necessary step in establishing an unreasonable restraint of trade. In Brunswick Corp., Brunswick had acquired several bowling centers that had defaulted in their debts to Brunswick. The plaintiff, a competitor of these centers, brought suit for an antitrust violation, alleging that the competitors would have gone out of business had Brunswick not acquired them, and that the plaintiff thereby suffered a loss of profits it would have obtained had Brunswick not enabled the competitors to survive. This Court held:

> "At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained

> are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of competition, not competitors,' Brown Shoe Co. v. United States, 370 US, at 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502. It is inimical to the purposes of these laws to award damages for the type of injury claimed here." 429 U.S. at 488.

By comparison, McCoy alleges that the "The Airlines have used their agreement with the Authority to impede competition in bidding for the food and beverage concession." (A. 36, ¶28). However, contrary to such conclusory allegations, the Authority is seeking to introduce competition into the awarding of the food and beverage concession. By so doing, there has been no harm to competition.

The declaratory judgment in Case No. 79-230 compels McCoy, the holder of the

exclusive food and beverage concession at the airport, to compete for any further extensions to its lease with the Authority. The Settlement Agreement binds the Authority to abide by the court's order. McCoy argues that the airlines and the Authority have thereby excluded it from competition by not extending its lease agreement.

The issue then is whether the agreement between the airlines and the Authority unreasonably restrains competition or is actually introducing competition by insisting that competitive bids must be taken before the exclusive food and beverage concession is to be granted.

It is no answer for McCoy to allege a loss and thereby insist that competition has been damaged. Nor is it for

McCoy to seek the alleged lost "profits and monies" it would realize if competition for the 1987 concession were eliminated. By awarding the concession in 1980, McCoy mistakenly contends that competition has been helped and no harm has occurred.

In a variety of contexts this Court has struck down actions which prevented competitors from entering a given market. United States v. General Motors, 384 U.S. 127 (1966); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Radiant Burners, Inc., supra.

McCoy has not alleged that the delay in the bid proposals will cause it to ultimately lose the concession. But even if McCoy did so assert, this would not create harm to competition. Competitive bidding increases competition; it

does not harm it. An agreement which strengthens and promotes competition is not a violation of law. Denison Mattress Factory v. Spring-Air Company, 308 F.2d 403 (5th Cir. 1962).

No interested qualified bidder for the contract will be prevented from competing for it. Competition, which was formerly closed, will be opened. An assertion that trade was unreasonably restrained is belied by the plaintiff's own complaint.

In 1986 or 1987 when the bids are let, there will be strenuous competition to achieve the food and beverage concession. This unavoidable fact undermines the plaintiff's charges under §§1 and 2 of the Sherman Act. The use of conventional antitrust language in drafting a complaint will not extend

the reach of the Sherman Act to wrongs not germane to that act. "The antitrust laws were never meant to be a panacea for all wrongs." Parmelee Transportation Co. v. Keeshin, 292 F.2d 794 (7th Cir. 1961).

In addition to requiring that an antitrust plaintiff allege an injury to competition in its complaint, there must also be some allegations of a loss or injury to plaintiff's business or property which occurred as a result of the alleged anticompetitive conduct. Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). This injury to plaintiff's business or property element requires proof of actual, present damages. Zenith Radio Corp. v. Hazeltine Research, Inc.,

401 U.S. 321, reh. denied, 401 U.S. 1015 (1971).

> "[F]uture damages that might arise from the conduct sued on are recoverable if the fact of their accrual is speculative or their amount and nature unprovable." Zenith Radio Corp., 401 U.S. at 339.

McCoy claims that its capital investment in the new terminal will be jeopardized by not obtaining the lease extension. In reality, McCoy's claimed damages result from its current lease. McCoy's investment in the new terminal is an obligation of the existing lease. McCoy does not allege that the Settlement Agreement or the Use Agreements compel it to make any investments in the new terminal. Thus, there is no sufficient allegation of any causal link between the alleged antitrust violation and the alleged injury.

McCoy also claims it is denied the present worth of future profits and monies it expected to obtain after 1987. Again, the causal connection is missing. The 1987 concession has not been awarded. Therefore McCoy has not lost it to someone else. It will not be awarded for six years. McCoy has not been excluded from the competition for the concession.

McCoy's allegations of damage, at this point, are entirely too speculative. Unless and until McCoy is actually excluded from bidding, it cannot allege an injury under the antitrust statutes. Zenith Radio Corp., supra, 401 U.S. at 339.

## Point II

THE FIFTH CIRCUIT'S AFFIRMANCE OF THE DISMISSAL OF PETITIONER'S CLAIM IS IN STRICT ACCORDANCE WITH DECISIONS OF THIS COURT AND COURTS OF APPEALS CONCERNING THE STATE ACTION EXEMPTION.

In Point II of its petition, McCoy contends that the summary affirmance by the Fifth Circuit of the dismissal of its Amended Complaint conflicts with the application of the so-called State Action exemption to antitrust claims. It also is claimed that this affirmance conflicts with the Third and Seventh Circuit decisions of Duke & Co., Inc. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) and Kurek v. Pleasure Driveway & Park District, 557 F.2d 580 (7th Cir. 1977), vacated and remanded 435 U.S. 992, reinstated 583 F.2d 378 (7th Cir. 1979), cert. denied 439 U.S. 1909 (1979) and with decisions of this Court, namely, Cantor v. Detroit

Edison Co., 427 U.S. 579 (1976) and California Retail Liquor Dealers Ass'n v. Midcal Alum., Inc., 445 U.S. 97 (1980). The claimed conflict is said by McCoy to arise out of "the application and disposition of antitrust immunity issues on Rule 12 motions to dismiss." (Petition for Writ of Certiorari at 11). An analysis of these cases will indicate that no such conflict exists.

In order to rebut petitioner's contentions in Point II, however, it is necessary to discuss and clarify the Parker state action exemption.

The Parker state action exemption was expressed in Parker v. Brown, 317 U.S. 341 (1943) and was later dealt with by the circuits in Duke & Co., Inc., supra, and Kurek, supra, and by this Court in Cantor, supra, and California

Retail Liquor Dealers Ass'n, supra. Briefly, the Parker exemption requires that the Sherman Act not be extended to prohibit state-controlled or state-mandated anticompetitive activities. Kurek, supra. This exemption is not an "affirmative defense" which requires the shifting of the burden of proof, as McCoy maintains. Rather, if a reviewing court determines that state-mandated activities were involved such that the Sherman Act is inapplicable, a dismissal of plaintiff's antitrust claims for failure to state a claim is appropriate and necessary. Kurek; Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

McCoy asserts that the test to be applied for purposes of Rule 12 is whether the Parker antitrust exemption is conclusively established on the face

of the pleading. (Petition for Writ of Certiorari at 12). This proposition is not contested by the Authority. However, petitioner then maintains that the Seventh Circuit in Kurek v. Pleasure Driveway & Park District, supra, held that antitrust immunity cannot be "automatic" and that this requires that a complaint withstand a Rule 12(b)(6) Motion to Dismiss. (Petition for Writ of Certiorari at 11).

A brief review of the Kurek decision will indicate that petitioner has misconstrued the "automatic" language of Kurek and that this language was not intended by the Seventh Circuit to indicate that Parker state exemption issues may not be dismissed on a Rule 12(b)(6) motion.

In Kurek, five golf professionals

sued, among others, a unit of local government known as the Park District, alleging that the Park District, as the owner of municipal golf courses in Peoria, Illinois, wrongfully terminated plaintiffs' concessions at the golf courses. All of these concessions were then granted by the Park District to Golf Shop Management, Inc. Bids from other golf professionals for the concessions were never received or considered by the Park District. The plaintiffs' business rights were terminated not because their leases had expired but because they refused to be coercively induced into levying unlawful sales taxes and because they refused to conspire to raise, fix and maintain their prices. The plaintiffs' complaint alleged that the action of the Park

District constituted a violation of the Sherman Act. The District Court dismissed this allegation on the basis of the Parker state action exemption.

The Seventh Circuit, in reviewing the dismissal, applied the following "well settled" standard: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 557 F.2d at 586, quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Certinaly the Kurek decision does not imply, as petitioner maintains, that an antitrust claim may not be dismissed on a Rule 12(b)(6) motion where the state authorization is patently obvious on the face of the complaint.

The Kurek court construed the then recent Supreme Court decisions of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) as limiting the Parker state action exemption to instances where a state government policy of anti-competition is demonstrated. The court held that the Park District's mandate from the state did not authorize the district to force private competitors such as the golf pros to violate the antitrust laws.

By comparison, the Airport Authority's mandate from the Florida legislature charges the Authority with planning and constructing new facilities, pursuant to a comprehensive plan, to ascertain anticipated revenues and budget expenditures accordingly, and to enter

into lease agreements with concessionaires on terms, conditions, rentals and fees according to rules of the Florida public service commission. (A. 26-27). The Authority's actions, according to the factual allegations in the Amended Complaint, have not exceeded that mandate. The Authority established a Concession Policy requiring competitive bids on proposals. The Authority agreed with the Airlines (which have guaranteed the revenue bonds sold to fund the new construction) generally to seek competitive bids for the concessions. The District Court ruled that the Authority was required to seek competitive bids or proposals for those concessions. Finally, the Authority entered into a Settlement Agreement whereby it agreed to comply with the court's order. (A.

27-30).

Not only has the Authority operated within the limits of its legislative mandate, but it has done so by fostering competition. All of these activities are plainly apparent on the face of McCoy's Amended Complaint.

Nonetheless, McCoy insists upon alleging that "the activities of the airlines are not supervised or controlled by state policy." (A. 31, ¶16). As a result of this, McCoy then further alleges that through the joint exercise of a heretofore lawful power, a combination or conspiracy arose. (A. 31, ¶18). McCoy thereby tries to completely disregard the holdings laid down by this Court in the now-called Noerr-Pennington doctrine.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965) hold that joint efforts to influence public officials in the passage or enforcement of laws are regarded beyond the scope of the antitrust laws. The entire thrust of Noerr and Pennington is aimed at insuring uninhibited access to government policy makers.

The Airlines were within the scope of Noerr-Pennington when seeking the declaratory judgment in Case No. 79-230. When a governmental entity such as the Airport Authority agrees to follow a prior court ruling sought by a private party, the principles of Noerr-Pennington are at work. That is, the airlines presentation of judicial decision to the

Authority is protected by Noerr-Pennington. The Authority's acceptance of the presentation does not then instantly turn the Authority or the airlines into conspirators.

McCoy attempts to hide behind California Retail Liquor Dealers Ass'n v. Midcal Aluminium, Inc., 445 U.S. 97 (1980), by asserting in its brief that the situation at bar and the facts of California Retail are similar. This simply is not true.

In California Retail, a wholesale wine distributor filed suit asking for an injunction against the state's wine-pricing program. The California statute required all wine producers and wholesalers to file with the state fair trade contracts or price schedules which then operated to prohibit the wholesaler from

selling wine to a retailer at another price. The court ruled that the California wine-pricing system constituted resale price maintenance which illegally restrained trade because the wine producer had the power to prevent price competition by dictating the prices charged by wholesalers.

In the case at bar, we are not dealing with similar facts. We are not dealing with a per se illegal retail price maintenance program. In California Retail, the issue was whether the scheme itself was "state action." Here, McCoy does not dispute the Authority's ability to grant the exclusive food and beverage concession. Therefore, if the Authority has the power to grant the exclusive food and beverage concession, it does not suddenly become unlawful for the

Authority to agree to comply with a federal court order and accept competitive bid proposals before exercising its prerogative of making the grant itself. The Authority is not sharing any of its power with the private parties. As the trial court stated:

> "Neither the contract nor the concession policy gives to the Airlines the authority to select the concessionaire. Nothing that this Court has held says that the Airlines have any right to select or to have any voice in the selection of the concessionaire." (A. 48).

In California Retail, the state played only a passive part in liquor pricing. Here, the Authority not only plays an active role but has the sole right to make the selection of the concessionaire. The Authority is not acting in a non-competitive fashion, as was the state in

California Retail. In California Retail competition was restrained by price-fixing. In the case at bar, competition is opened by the requirement of competitive bidding. Here, the Authority's acts are consistent with the aims of the Sherman Act, while in California Retail, the program contrasted sharply with the Sherman Act.

The other cases McCoy cites in its brief to substantiate a conspiracy with a governmental agency are also inapplicable.

In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), an antitrust action was brought against a private utility which supplied light bulbs to residential purchasers of electric power without additional charge under a marketing practice approved by the Michigan

Public Service Commission. The Supreme Court held that the state exemption from antitrust laws could not be inferred. Again, it must be stressed that McCoy is not contending the Airport Authority's ability to regulate. Yet, McCoy asserts that the case at bar parallels Cantor. McCoy in its brief states at page 16 that Cantor involved a monopoly power that could be rightfully exercised by the state. Then McCoy asserts, "In Cantor, the utility monopoly was extended beyond its reasonable limits to include the light bulb market." In the instant case, there is no new market that is being included. There is no extension of a monopoly power. All that is occurring is competitive bidding being introduced into the food and beverage concession.

Duke and Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) also is not on point. In Duke and Co., the manufacturer and seller of malt beverages brought suit against various private concessionaires and the municipal authority alleging the defendants had conspired to boycott plaintiff's beverages in municipal facilities operated by the defendants.

In the present case, no boycott of plaintiff is factually alleged. McCoy is not prevented from bidding for the food and beverage concession, nor has McCoy been told that it would be excluded from receiving the food and beverage concession.

McCoy's contention of Duke and Co.'s holding of the Noerr-Pennington doctrine does not apply here. Rather, the court statement that:

> "...the Noerr-Pennington immunity covers a state governmental entity which 'listens to anticompetitive pleas.' Doubtlessly this proposition is correct so long as the public body acts within its legal discretion and in what it considers the public interest...."

is applicable. For here, unlike in Duke and Co., the public body is acting in the public interest by establishing competition where there was none before.

## Point III

THE FIFTH CIRCUIT'S AFFIRMANCE WITHOUT AN EXTENSIVE WRITTEN OPINION WAS APPROPRIATE AND SUFFICIENT IN THIS CASE.

McCoy's final basis in support of issuance of the writ of certiorari involves a broad policy assertion that appeals to circuit courts, such as its own appeal to the Fifth Circuit, should not be permitted to be decided without opinions.

Petitioner bases this contention upon its belief that its case involves "complex, vital and recurring aspects of antitrust law." (Petition for Writ of Certiorari at 21).

The obvious, basic flaw in McCoy's position on this point is that the Fifth Circuit did explain the basis for its affirmance. While brief, the

appellate court's comments on rehearing certainly were clear.

There may be merit, as a matter of policy, in having the appellate courts issue opinions when the trial courts' decisions of law conflict with other appellate cases. But here, this Court is not faced with any conflicts. This is not a case which justifies issuance by this Court of a statement of that policy.

## CONCLUSION

The petition for a writ of certiorari should be denied.

VAN DEN BERG, GAY & BURKE, P.A.
16 South Magnolia Avenue
Post Office Box 2193
Orlando, Florida 32802
305/423-7656

By: _____
Norman F. Burke
Counsel of Record for
Respondent Greater Orlando
Aviation Authority

and

_____
Jon M. Wilson
Counsel for Respondent
Authority

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served with copies of this brief have been served in accordance with the Supreme Court Rule 28.3, having been deposited copies of the brief in a U.S. Post Office or mail box, with first class postage prepaid, addressed to the following counsel of record at their post office addresses:

William VanDercreek, Esquire
Counsel of Record for Petitioner
Suite 800
Two Turtle Creek Village
Dallas, Texas 75219

Richard Sinkfield, Esquire
Counsel for Respondent Airlines
Suite 3200
101 Marietta Tower
Atlanta, Georgia 30303

this _____ day of December, 1981.

Norman F. Burke

# Petitioner's Brief

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IN THE

# Supreme Court of the United States

October Term, 1981

NO. 81-888

McCOY RESTAURANTS, INC.
*Petitioner,*

v.

GREATER ORLANDO AVIATION AUTHORITY, DELTA AIR LINES, INC., EASTERN AIRLINES, INC., REPUBLIC AIRLINES, INC., NATIONAL AIRLINES, INC., and PAN AMERICAN AIRWAYS, INC., as Successor-In-Interest to NATIONAL AIRLINES, INC.
*Respondents.*

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*On Petition For Writ of Certoriari To The United States Court of Appeals For The Fifth Circuit (Now The Eleventh Circuit)*

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## REPLY BRIEF OF PETITIONER McCOY RESTAURANTS, INC.

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WILLIAM VanDERCREEK
800 Two Turtle Creek Village
Dallas, Texas 75219
(214) 559-2900
*Counsel of Record*

and
JEFFREY H. ABRAMS
of the Law Firm of
ROBERTS, BAGGETT, LaFACE, RICHARD & WISER
P. O. Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

*Counsel for Petitioner*

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## REPLY BRIEF OF PETITIONER McCOY RESTAURANTS, INC.

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## PRELIMINARY STATEMENT OF IMPORTANCE

The legal issues in this case are presented in a significant context involving the economic interrelationship among airport authorities, airlines, airport concessions, and the public. These issues concern vital concepts of antitrust law: the sufficiency of anticompetitive injury allegations and the application of *Parker* and *Noerr-Pennington* immunities on a Rule 12 motion to dismiss. Indeed, the sufficiency of alle-

gations necessary to state injury to competition is integral to all antitrust complaints. The Petitioner's Questions Presented are particularly appropriate for the exercise of discretionary certiorari review because, contrary to the Briefs in Opposition, the decision below squarely conflicts with decisions of this Court and other courts of appeals and raises matters concerning this Court's supervisory powers.

## I. THE RESPONDENTS AVOID RECOGNITION OF CONFLICT BY SERIOUSLY MISCONSTRUING THE AMENDED COMPLAINT CONTRARY TO PRINCIPLES GOVERNING RULE 12 MOTIONS TO DISMISS

As the Respondents well know, the Rule 12 motion to dismiss presented questions of law, not fact; *to wit,* whether there are legally sufficient allegations of injury to competition and whether *Noerr-Pennington* or *Parker* immunities are established as a matter of law on the face of the Amended Complaint. In arguing against certiorari, the Respondents, Greater Orlando Aviation Authority ("Authority"), and collective airlines ("Airlines"), posit the absence of a conflict on the legal issues by a strained misreading of the Amended Complaint.* Both Respondents restate Petitioner's, McCoy Restaurants, Inc. ("McCoy") Questions Presented to address issues that bear little resemblance to the allegations in the Amended Complaint which, of course, is to be construed in favor of Petitioner. The purported "restatement" of the facts in the Airlines' Brief (pp. 3–12) and the Authority's Brief (pp. 3–13) conveniently omits allegations which, in themselves, state a distinct injury to competition and injury to this Petitioner.[1] Because the Respondents choose to oppose certiorari (and avoid recognition of conflicts) by the tactic of omitting material allegations, it would perhaps be helpful to the Court for Petitioner to

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*References to the Amended Complaint are made thus: (App. Pet. Cert. p. __, Para. __).

make appropriate references to the Amended Complaint. A copy of the complete Amended Complaint is reproduced on pages 24 through 37 of the Petition for Write of Certiorari.

The Amended Complaint alleges a distinct injury to competition and causal injury to McCoy as follows:

> 1. The Airlines and the various concessions share a debt-service obligation for the airport revenue bonds. The cost of operating the airport, including debt-service, that is not paid by concession fees (usually percentages of gross sales) must be paid by the Airlines through landing fees. McCoy's lease extension would have been granted at the same fee level (same percentage of gross sales). Among other things, the Airlines want the concessions, including McCoy, to pay at a higher fee level as the more fees generated by the concessions, the less owed by the Airlines. (App. Pet. Cert. pp. 27–33, Para. 7, 18, 20, 21)
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> 2. The Airlines combined to preclude McCoy's lease extension because: (a) they are seeking to cause concessions to pay such substantial sums for debt-service (at greater percentages of gross sales) that the Airlines will not have to pay landing fees; (b) they are seeking to replace McCoy with a concessionaire that will offer preferential catering discounts to the Airlines; and (c) they are seeking to own and operate food and beverage facilities in the airport in horizontal competition

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[1]The Respondents made absolutely no reference to many crucial allegations of the Amended Complaint. *See, e.g.*, App. Pet. Cert. pp. 26–32, Para. 7 (regarding debt-service; the Airlines' incentive to control the market), 17 (establishing horizontal competition), 18 & 19 (injury to competition), 20 (injury to Petitioner and the Authority's admission of antitrust violations).

with McCoy. (App. Pet. Cert. pp. 31-36, Para. 17, 18, 19, 28)

3. The Authority fully intended to extend McCoy's lease until the Airlines combined with the Authority to share control of the concession market. This is evidenced by a collective agreement which provided that the Authority would not modify its Concession Policy without the prior approval of the Airlines. The agreement is in contravention of the independence of the Authority; *i.e.*, the Authority was empowered by statute to modify or change its policies without interference from private parties. Respondents therefore combined to share control of the concession market and to prevent McCoy from receiving an extension of its lease. (App. Pet. Cert. pp. 30, 32, Para. 15. 20)

Although the Respondent's self-serving summary of the Complaint is that the Airlines merely sought to "inject competition into the market," the allegations of the Amended Complaint show the Airlines' desire to "increase competition" was and is merely a facade to further reduce landing fees paid by the Airlines. (App. Pet. Cert. pp. 31-32, Para. 18, 19.)

The Respondents obfuscate the direct conflict between the decision below and *Radovich v. National Football League,* 352 U.S. 445 (1957) by addressing only part of the allegations in the Amended Complaint.[2] In *Radovich, supra,* this Court reviewed a Rule 12 dismissal and decided the test as to sufficiency for antitrust complaints was whether "the claim is wholly frivolous." 352 U.S. at 453. The conflict with *Radovich* initially lies in the fact that the Fifth Circuit's affirmance failed to recognize that the trial court went beyond the face of the complaint to reach State Action issues which, in itself, belies any suggestion that the

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[2]*See, e.g.,* page 3, footnote 1, *infra.*

pleading was "wholly frivolous." Additionally, the elements of an antitrust complaint as enumerated in *Radiant Burners, Inc. v. Peoples Gas Light and Coke Company,* 364 U.S. 656 (1961), and its progeny, are expressly present in the Amended Complaint.

Respondents cite *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 447 (1977) to suggest that McCoy has suffered illusory profits at best.[3] While the injury in *Brunswick* may have been speculative, the injury alleged in McCoy's Amended Complaint is real. By the Authority's own admission, the extension would have been granted but for the wrongful conduct of the Airlines. (App. Pet. Cert. p. 32, Para. 20.) This lease extension has a substantial present value in economic terms. There is a considerable economic difference between the value of a profitable lease that expires in six years and an extended lease that expires in twenty-six years. Since the Amended Complaint alleges both injury to competition and causal injury to McCoy, the Fifth Circuit's decision directly conflicts with *Radovich v. National Football League, supra,* and *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., supra.*

With regard to the antitrust immunity issues, Respondent Authority argues that there is no conflict with *Kurek v. Pleasure Driveway & Park District,* 557 F.2d 580 (7th Cir. 1977), *vacated and remanded,* 435 U.S. 992, *reinstated,* 583 F.2d 378 (7th Cir. 1979), *cert. denied* 439 U.S. 1909 (1979). With deference, the language of the Seventh Circuit in *Kurek* could not be more explicit and the conflict could not be more apparent. The *Kurek* court reversed the Rule 12

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[3]The Airlines employ the artifice of transposing "McCoy" and "Pueblo" in a quotation from the *Brunswick* decision. (Airlines' Brief p. 17.) However, McCoy, unlike Pueblo, had a negotiated agreement that was interfered with by deliberate actions of its competitors. Pueblo was not forced out of the market by Brunswick; McCoy, however, was prevented from receiving its lease extension by the conspiracy in this case. Respondents' reliance on *Brunswick* is therefore misplaced.

dismissal of an antitrust complaint against park district members that was predicated on state action immunity. After acknowledging that park districts and other subordinate government units may avail themselves of a *Parker* defense, the Seventh Circuit stated that "a subordinate governmental unit's *Parker* claim is less obviously justified than the same claim made by a state government." 557 F.2d 590. The *Kurek* court concluded that antitrust "immunity" for subordinate government units "cannot be automatic." *Id.* Petitioner submits that the automatic application of antitrust immunity for the combination of Respondents (the Authority being a subordinate unit) on a Rule 12 motion to dismiss is precisely what is at issue here. The decision below sharply conflicts with *Kurek* because the immunity was automatically applied by the district court and affirmed, without opinion, by the Fifth Circuit.

The pleading in this case expressly negates the application of *Noerr-Pennington* or *Parker*. The activities of the Airlines are not supervised or controlled by state policy. (App. Pet. Cert. p. 30, Para. 16).) The Authority argues that its actions under the Amended Complaint are totally within Chapter 75-464, *Laws of Florida*, Section 7 (1975).[4] In paragraph 5 of the Amended Complaint reference is made to Chapter 75-464, and it is alleged that "[n]o provision was made in that law for the Authority to contract

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[4]Chapter 75-464, *Laws of Florida*, Section 7 (1975) provides, in relevant part:

> It shall be the duty of the authority to . . . prepare and adopt a comprehensive plan for the construction, development and improvement of any and all projects of the authority, and for the construction, development and improvement of facilities within Orange County, Florida, for handling air passengers, mail, express and freight, and for handling general aviation and commercial aircraft. *Such comprehensive plan may be extended, modified or changed by the authority from time to time.* . . . (emphasis added).

with Delta, Eastern, National or Republic to abandon its discretionary legislative power, whether for their benefit or as consideration to them." (App. Pet. Cert. p. 26.) If present negotiations for McCoy's lease extension would constitute a departure from the concession policy, the Authority should have unfettered discretion to do so, at least until the Airlines interfere in that process.[5] Such interference is unlawful because the Florida legislature did not authorize the Authority to contract away its discretionary power to private parties such as the Airlines. (App. Pet. Cert. p. 29, Para. 14.) In addition, the Authority's argument seems incongruous as the Amended Complaint alleges, on its face, that the Authority's original answer (prior to its settlement with the Airlines and joining in the Airlines' motion to dismiss), asserted an antitrust cross-claim against the Airlines.[6]

The Airlines' Brief relies entirely upon *Noerr-Pennington* as the immunity basis for lack of conflict. The record reveals that the trial court's order was based substantially on "res judicata" and, in part, on the *Noerr-Pennington* doctrine. (App. Pet. Cert. pp. 44–49.) The focus of the order was the declaratory judgment suit brought by Delta. The Respondent Airlines misrepresent the outcome of that suit to this Court. Delta did not prevail on the merits (Airlines' Brief, p. 21); the judgment was vacated and Delta's complaint ordered dismissed by mandate of the Fifth Circuit in case no. 80-1560. A copy of the mandate was attached to McCoy's Petition for Rehearing before the Fifth Circuit.

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[5]The concession policy could be "modified or changed from time to time." Chapter 75-464, *Laws of Florida*, Section 7 (1975). *See*, page 6 , footnote 4, *infra*.

[6]The Authority admitted that the "damages. . . suffered by (McCoy) result from the wrongful action taken by Delta and presumably the other three Airlines to attempt to interpret the Agreement in a manner foreign to the intent of all parties at the time said Agreement was entered into and still contrary to the intent of [the Authority]".

The court in denying rehearing acknowledged its Rule 21 disposition "was not based on the ground of res judicata, but on the other two grounds contained in the district court's order." (App. Pet. Cert. p. 53) However, the Fifth Circuit's reliance on the antitrust immunity would seem unfounded as the basis of the trial court's *Noerr-Pennington* finding was its reliance on a subsequently vacated and dismissed declaratory judgment proceeding. (*See* Order – App. Pet. Cert. p. 44.)

The thrust of McCoy's antitrust complaint was the unlawful action of the Authority in sharing its limited monopoly power with private parties (the Airlines), especially when the private parties are in horizontal and vertical competition with McCoy. The assertions of *Noerr-Pennington* and *Parker* simply do not apply because the Airlines coerced the Authority to reject the agreed lease extension. (App. Pet. Cert. p. 35, Para. 27.) Therefore, the Fifth Circuit's reliance on antitrust immunity is in clear conflict with the caselaw cited in McCoy's Petition (Pet. Cert. pp. 10–11).

## II. THE RESPONDENTS' ARGUMENT THAT THE FIFTH CIRCUIT AFFIRMANCE WAS NOT A LOCAL RULE 21 DISPOSITION IS WITHOUT MERIT

Respondents apparently do not question the importance for this Court, under its supervisory power, to consider whether appropriate guidelines for disposition without opinion are needed for federal appellate courts. The vast number of such dispositions under various local circuit rules coupled with congressional displeasure attest to its importance. (*See* authorities cited in Pet. Cert. pp. 17–19.) Instead, the Respondents argue that there was no (Fifth Circuit Local) Rule 21 disposition without opinion because that court, in denying rehearing, stated that its basis was not "res judicata, but on the other two grounds contained in the district court's order." (App. Pet. Cert. p. 53.) Such

argument seems somewhat vacuous as the very order denying rehearing (App. Pet. Cert. p. 53) expressly acknowledged that the court "had affirmed the district court's decision without writing an opinion" and expressly denied the "other contentions contained in the Petition for Rehearing," (which included the suggestion that a Rule 21 disposition was improper).

Far from negating the need for review by this Court, the action of the Fifth Circuit on rehearing demonstrates the need for this Court's supervisory power. The Fifth Circuit avoided recognition of seemingly contrary Supreme Court and other circuit cases concerning the sufficiency of "injury to competition" allegations and the *Parker* or *Noerr-Pennington* doctrines. These issues are too important to warrant a local Rule 21 disposition by the Fifth Circuit.

When lower federal courts become too adroit at distinguishing Supreme Court precedent, this Court has frequently granted certiorari to correct such deviation. The avoidance of Supreme Court precedent is jurisprudentially more serious because, if unchecked, it fosters arbitrariness without effective recourse.

## CONCLUSION

For the reasons stated in the Petition for Certiorari and this Reply Brief, the Petition for Certiorari should be granted.

WILLIAM VanDERCREEK
800 Two Turtle Creek Village
Dallas, Texas 75219
(214) 559-2900
*Counsel of Record*

and

JEFFREY H. ABRAMS
of the Law Firm of
ROBERTS, BAGGETT, LaFACE,
RICHARD & WISER
P. O. Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

*Counsel for Petitioner*